UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D-024
GOVERNMENT'S RESPONSE

To the Defense's Motion to Compel Production of Out-of-Country Witnesses at Trial, Deposition Testimony, or, Alternatively, Abatement

31 March 2008

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b).

2. Relief Requested: The Government respectfully submits that the Defense's Motion to Compel the Prosecution to produce at trial, via live testimony or video testimony, for the Defense, or an order compelling depositions, or alternatively, abatement of the proceedings, should be denied.

3. Overview: The Defense request for production of four out-of-country witnesses, or alternatively, to order foreign country depositions, should be denied. Two of the requested witnesses, Abdallah Tabarek and Nasser al-Bahri, *(attachment A)* served with the accused as members of Osama Bin Laden's bodyguard detachment and would not be allowed to travel to Guantanamo Bay, Cuba, to testify for the accused even if they wished to do so. The other two, Muhammed Ali Qassim al-Qala and Umat al-Subur Ali Qassim al-Qala, are the brother-in-law and wife of the accused and sympathize with al Qaeda. These two might not be able to travel to Guantanamo Bay, although the Prosecution has not firmly determined their ability to travel, it cannot guarantee their production. Finally, and most importantly, personal security concerns of Military Commission participants traveling to Yemen greatly outweigh the need for depositions or live video teleconferencing of the three Yemeni witnesses (al-Qala, al-Qala and al-Bahri) when both adequate substitutes to the sought testimony exist and the Defense already possesses, in video form *(attachment B and C)*, the evidence it seeks to introduce.

The request for the production of Tabarek blatantly fails to meet the mandatory legal requirements necessary for production or ordered deposition and must be denied.

Adequate substitutes are available to the Defense and abatement is not appropriate.

4. Burden and Persuasion: Defense bears the burden of persuasion. *See* RMC 905(c)(2)(A).

5. Facts:

a. On February 28, 2008 Defense requested the presence of four out-of-country witnesses, or alternatively, to order foreign country depositions, of Abdallah Tabarek and

Nasser al-Bahri. Both served with the accused as members of Osama Bin Laden's bodyguard detachment and would not be allowed to travel to Guantanamo Bay, Cuba, to testify for the accused even if they wished to do so. The other two, Muhammed Ali Qassim al-Qala and Umat al-Subur Ali Qassim al-Qala, are the brother-in-law and wife of the accused and sympathize with al Qaeda.

b. Nasser al-Bahri is the brother-in-law of the accused, by marriage. He and the accused married sisters at the behest of Osama Bin Laden. *Bahri statement, previously admitted in motion for HVD access.*

c. The accused and his wife lived in a compound in Kandahar next to one of the houses belonging to Osama Bin Laden and other high ranking al Qaeda members. *Defense filing for motion for HVD access.*

d. Nasser al-Bahri was arrested by the Yemeni Government and held in jail for ten months due to his ties to Al Qaeda, but has since been released.

e. Defense has provided the Prosecution with video testimony that it took during its trips to Yemen to discuss this case with Nasser al-Bahri, Muhammed Ali Qassim al-Qala and Umat al-Subur Ali Qassim al-Qala. *(Attachments B and C).*

f. To date the Prosecution cannot guarantee the presence of Muhammed Ali Qassim al-Qala and Umat al-Subur Ali Qassim al-Qala to provide in person testimony in Guantanamo Bay.

g. Yemeni Government officials confirmed that a March 18, 2008 mortar attack on the U.S. Embassy in Sanaa was perpetrated by al Qaeda. This is just the most recent in a long list of attacks against U.S. interests in Yemen.

h. The State Department has issued a travel and security warning against possible attacks by extremist individuals or groups against U.S. citizens, facilities, businesses and perceived U.S. interests.

i. al Qaeda has previously threatened Military Commission participants.

6. Discussion: Defense seeks production of three witnesses from Yemen, Nasser al-Bahri, Muhammed Ali Qassim al-Qala and Umat al-Subur Ali Qassim al-Qala, and a fourth witness, Abdallah Tabarek, a former bodyguard of Osama Bin Laden, purportedly located in Morrocco. Production of these witnesses, ordered depositions, or live video testimony is unnecessary and/or should not be ordered. This response first addresses the Yemeni witnesses and then the analysis associated with the production or deposition of Abdallah Tabarek.

a. Abdallah Tabarek and Nasser al-Bahri are/were members of al Qaeda and at one time were two of the three members of Osama bin Laden's

security detail that were closest to Osama Bin Laden and cannot nor probably would not travel to Guantanamo Bay.

Since the 1998 al Qaeda attack on the U.S. Embassies in Kenya and Tanzania, Abdallah Tabarek, Nasser al-Bahri and Salim Hamdan were the three closest protectors of Osama Bin Laden. Attachment A, a still photograph of the Al Qaeda celebration of Eid al-Fitr in 2000, shows Abdallah Tabarek and Nasser al-Bahri performing their duties.[1]

The Prosecution has verified that both individuals appear in at least one U.S. Government database that generates a list of individuals that would be denied travel. As such, the Defense was correct to assert that these individuals, even if they wished to attend, cannot be produced. The Defense has provided no evidence that Abdallah Tabarek is even willing to participate in the commissions process.

b. The request for production of Abdallah Tabarek should be denied because the Defense has failed to meet minimum legal requirements for production making the applicable legal analysis impossible to apply.

R.M.C. 703 sets out detailed procedural requirements for the Defense when requesting the production of witnesses. R.M.C. 703(b)(1) states that Defense is entitled to the production of "any available witness whose testimony on a matter in issue... ...is relevant and necessary." R.M.C. 703(c)(2)(B)(i) requires the Defense justify its request by providing the name, telephone number, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony. The rules are very explicit in order to allow the Government to verify the proffered synopsis and determine the willingness of the proposed witness to participate. It also facilitates determining the location of the requested witness so the Government can produce him. The production of witnesses at trial is not a fishing expedition. Prior to production, the Defense is required to make a substantial showing of relevance and to provide certain information to the Government sufficient to permit the Government to verify that showing prior to granting production, or, in this case, traveling more then half way around the world for a deposition that the Government cannot even verify the witness would participate in.

With respect to the requested witness Abdallah Tabarek, the only contact information provided by the Defense was "Casablanca, Morocco," a city on the northern coast of Africa with a population between 3.1 and 6 million people. The Defense fails to provide a phone number, current location, or last known address of Tabarek.. Rather then providing a location, the Defense asserts that because Tabarek was a former detainee at Guantanamo Bay, the Government could locate him. That position is unsupportable in the law and the Defense position is even more untenable when they openly admit their

[1] Attachment A was introduced into evidence during the December 5, 2007 "jurisdictional hearing." Special Agent Bob McFadden identified both prospective witnesses in this photo as well as the accused. *See* Jurisdictional Hearing.

overtures to contact Tabarek have been met with nothing but resistance by his known legal representative.

The inability to make direct contact with Tabarek prevents the Prosecution from verifying the Defense proffer, or even attempting to see if he is willing to provide testimony or simply provide an interview. In fact, all known information provided by the Defense actually suggests otherwise, that Tabarek is not willing to participate, which most likely also explains their inability to provide more then a three sentence, "cookie-cutter" proffer that fails to addresses any legal standard of relevance and necessity.

c. The requested deposition order for Tabarek is illogical

While the failure to secure a verifiable proffer mandates denial of production, the lack of contact information denies the Government the ability to ascertain his willingness to participate in a deposition with members of the Commission. Deposing Tabarek is not possible given the inadequate proffer and lack of contact information.

d. The Defense seeks cumulative evidence.

The Defense properly states that the Defendant is entitled to the production of available witnesses whose testimony is both "relevant and necessary." R.M.C. 703(b)(1). They concede however, that relevant evidence is necessary only when it is not cumulative. Recognizing that the proffered witnesses cannot or will not travel to Guantanamo Bay, the Defense has sought an order for deposition testimony as a substitute for production. However, the Defense possesses, in video form, the same information it seeks from a video deposition. The Defense has the ability to offer the evidence is possesses under M.C.R.E. 803, making the need for the video deposition unnecessarily cumulative. Moreover, the Defense concession that court ordered video depositions can serve as an adequate court room substitute further militates against an ordered deposition. Defense need do no more then follow the notice provisions under M.C.R.E. 803 in order to attempt to introduce the information in the same format it wishes to re-procure by traveling half way around the world.[2] The Prosecution is not immediately conceding the admissibility of the video statements, only that they exist and the Defense has an avenue in which to seek its admissibility.

e. Formal depositions of these witnesses are inappropriate

Depositions are controlled by RMC 702 *et al.* RMC 702 authorizes depositions to preserve potential testimony and become admissible, in part, due to their reliability because they are supported by the power and protection of U.S. laws, specifically the crimes of perjury and false statement against a deponent. In this case, depositions are not

[2] Prosecution does not agree to stipulate to the admissibility of video testimony, however, the rules clearly provide a different avenue of similar admissible evidence that the Defense agrees is tantamount to production.

required to preserve the proffered testimony, nor is their reliability supported by the power and protection of U.S. laws.

i) Beyond the perjury power of the United States

The location of the proposed depositions is Yemen and the nationality of the deponents is Yemeni. Thus, any deposition would be beyond the enforceability of U.S. laws. Without the enforcement power of U.S. laws, the requested depositions are nothing more then video taped statements made in the presence of the Prosecution which serves to cloak the statements with a false legitimacy.

ii) Sought after testimony is already preserved, therefore there is no "exceptional circumstance" as required under RMC 702.

RMC 702 requires the showing of "exceptional circumstance" prior to the ordering of a deposition. As previously discussed, the fundamental reason for ordering depositions is not met. The proffered testimony is already preserved and is therefore in potentially admissible form. As discussed at a later point in this brief, alternative forms of testimony are available.

iii). Security concerns mandate the use of alternate forms of testimony; not depositions or live video testimony

Defense has moved that this Commission order Prosecution and Defense to travel to Yemen, confront and depose known al Qaeda members and sympathizers whom, by the organization's own words is a terrorist organization and sworn enemy of the United States. In the most recent of hundreds of audiotaped messages, Ayman al-Zawahiri[3] advocates for al Qaeda members and sympathizers to continue attacking United States civilians and military, whenever and wherever it can.[4] Al Qaeda sympathizers are to "Select your targets, collect the appropriate funds, assemble your equipment, plan [your attacks] accurately, and then charge toward your targets ... There is no place today for those who claim that the battlefield with the Jews is limited to Palestine."[5] *(Attachment D)*. The Defense so moves with the audacious desire to attempt to procure testimony, which it already possesses in what is most likely admissible form, video recordings. When weighing the legitimate security concerns associated with the request to obtain cumulative evidence from these witnesses, it is very clear that this request should be denied.

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[3] Ayman al-Zawhiri is the #2 person in charge of al Qaeda and is wanted for his role in a multitude of terrorist attacks. The accused has admitted swearing bayat to Osama Bin Laden and has openly admitted driving and protecting Osama Bin Laden and Ayman al-Zawahiri to safety after the September 11, 2001 attacks and after the U.S. attack on Afghanistan began.

[4] *See Christian Science Monitor Reporting of statement at* http://www.csmonitor.com/2008/0324/p99s01-duts.html---

[5] *Translated and reported by Newsweek* at: http://www.newsweek.com/id/129176/output/print

(A) Proposed Yemeni witnesses have admitted ties to al Qaeda

As previously discussed, the three Yemeni witnesses have a very detailed history of membership in al Qaeda or close association with al Qaeda senior leadership, its members or sympathizers. As such, it would be impossible to avoid creating a significantly heightened security risk. It would be impossible to control the release of travel itineraries, proposed meetings or other potential scheduling issues associated with any proposed deposition.

(B) al Qaeda has an active terrorist presence in Yemen

Even if one were to dispute the proffered individual's continued loyalty toward al Qaeda, it remains an incredibly unnecessary security risk due to the active al Qaeda presence in Yemen. United States interests have been the subject of numerous al Qaeda linked terrorist attacks since the al Qaeda attack on the USS Cole in 2000. *Attachment (e)*[6] outlines just a few of the recognized al Qaeda attacks against American interests in the very city the accused invites the prosecution to travel to and meet known terrorists or terrorist sympathizers. Moreover, on March 22, 2008, just two days before the Defense filed this motion, Yemeni Government officials confirmed that a March 18, 2008 mortar attack on the U.S. Embassy in Sanaa was perpetrated by al Qaeda.[7]

This terrorist threat makes business and vacation travel to Yemen a high security risk for Americans. In fact, the State Department has issued multiple travel warnings to Americans that desire to travel to Yemen. These travel warnings are because we are Americans. The State Department travel and security section on its website echoes these concerns in that the State Department "remains concerned about possible attacks by extremist individuals or groups against U.S. citizens, facilities, businesses and perceived interests."[8] The website includes a list of additional al-Qaeda attacks and continues with the warning, "throughout the country, U.S. citizens are urged to exercise particular caution at locations associated with foreigners, such as the Sanaa Trade Center, American-affiliated franchises, restaurants and shops in the Hadda area of Sanaa, in Aden and elsewhere, and at restaurants and hotels frequented by expatriates."[9] *(Attachment F).*

The warnings associated with Sanaa continue. Specifically, "Travel is particularly dangerous in the tribal areas north and east of Sanaa. Armed tribesmen in those areas have kidnapped a number of foreigners in attempts to resolve disputes with the Yemeni government. Hostilities between tribesmen and government security forces in the Sadah

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[6] See http://www.cnn.com/2008/world/meast/03/22/Yemen.al.qaeda.ap/index.html

[7] The mortar attack missed the embassy and killed one security guard and injured 13 school girls.

[8] Department of State at: http://travel.state.gov/travel/cis_pa_tw/cis/cis_1061.html

[9] Id.

governorate north of Sanaa have flared up on several occasions since 2005. Americans are urged to avoid this region during periods of conflict."[10]

(C) al Qaeda has attacked its enemies under the auspices of a meeting

There are a number of public examples of al Qaeda attacking and executing individuals that it had agreed to meet. In this case, testimony was taken that al Qaeda (or Taliban) terrorists ambushed U.S. and coalition forces outside Taktepol in November of 2001 when they were supposed to meet under a flag of truce. Fortunately, no one was killed in that attack. Sadly, probably the most shocking al Qaeda assassination during the war on terror occurred when Wall Street Journal Reporter, Daniel Pearl, was kidnapped and killed by al Qaeda operatives on February 1, 2002 when he was supposed to meet and question al Qaeda operatives regarding the war on terror.

(D) al Qaeda has specifically threatened Military Commission participants

In an audio-taped statement attributed to al Qaeda leader Ayman al Zawahari, he states that the United States and its allies will pay "a very high price" if detainees being held at Guantanamo Bay, Cuba are tried by military tribunals and face the death penalty."[11] This statement leaves little to the imagination in that it is a direct threat against the United States for its actions regarding the trial of detainees in Guantanamo Bay. It also makes the participants, especially the Prosecutors of known and admitted al Qaeda members, potential terrorist targets. As such, ordering depositions or travel to a location where active al Qaeda terrorist activity exists in order to meet known al Qaeda sympathizers when the prosecutors schedules cannot be protected is more then unwise. This concern is even more compounded due to the recent announcement that the United States has sworn charges and will seek the death penalty against six individuals in connection with the September 11, 2001 attacks on the United States.

f. Defense can produce/introduce adequate substitutes

The MCA and MCRE specifically provide a variety of avenues of admissibility that allow a party to introduce evidence as a substitute to live witness testimony in situations where witnesses are otherwise unavailable. In addition to the defense requested relief (video teleconferencing or depositions), neither of which are practical in this situation, litigants have a panoply of options to secure the testimony of the out of country witnesses that are beyond the jurisdiction of military commissions and where depositions are not practical. The Defense can offer live telephone testimony, it can

[10] Id.

[11] CNN web posting of August 4, 2003.

attempt to introduce the recorded video testimony currently in their possession by asserting the applicable hearsay rules for military commissions.[12] Given that there is no practical evidentiary difference between Defense video testimony offered under MCRE 802 and the recorded deposition the Defense so readily covets, it would appear that this information is, even in the eyes of the Defense, an adequate substitute. If the Defense is willing to entertain the use of deposition testimony, any objections it may have regarding confrontation or presence is without merit.

g. Abatement is not appropriate

The Defense suggests that in the absence of production or publicly sending individuals to high threat areas to take depositions (or procure live video testimony) of admitted members or associates of al Qaeda, the court should abate the proceedings. This position would produce an absurd result, abatement of a proceeding when the Defense has the information it seeks in the form of testimony it recognizes it might otherwise be required to use. The result is also counter to promulgated rules or the intent of Congress when passing the M.C.A. *See discussion to R.M.C. 703(b)(3)* which expressly recognizes that Congress contemplated this very situation and expressly provided an additional substitute for presence of witnesses or mandatory depositions, it is the relaxed hearsay admissibility rules of evidence (also traditional methods (stipulations of fact, or live telephone testimony) tare also available.

7. Oral Argument: The Defense previously waived oral argument and the Prosecution does as well.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

Respectfully Submitted:

/s/
William B. Britt
Lieutenant Colonel, U.S. Army
Prosecutor

Timothy D. Stone
Lieutenant Commander, U.S. Navy
Assistant Prosecutor

[12] *See discussion of RMC 703(b)(3) which specifically addresses the very issue before the court and cites to the hearsay procedures argued for by the Prosecution.*

/s/
John Murphy
Assistant U.S. Attorney
Assistant Prosecutor

/s/
Clayton Trivett, Jr.
Assistant Prosecutor

ATTACHMENT A

Attachment A

ATTACHMENT B

Defense Discovery
19 Mar 08
US v. Hamdan

Video of Interview by Defense of
Muhammed Ali Qassim al-Qala'a
and
Umat al-Subur Ali Qassim al-Qala'a

Jan 08

ATTACHMENT C

ATTACHMENT D

Newsweek

Menacing Message

How dangerous is Al Qaeda's latest tape?

Michael Isikoff and Mark Hosenball
NEWSWEEK WEB EXCLUSIVE
Updated: 5:50 PM ET Mar 26, 2008

The FBI, spurred in part by this week's unusually menacing audio message from Ayman Al-Zawahiri, today advised state and local law enforcement officials to expect an increase in Al Qaeda propaganda messages aimed at inciting followers to commit terrorist acts.

FBI and counterterrorism officials stressed today that they have no fresh intelligence about any specific threats—one reason why today's FBI intelligence bulletin, issued in conjunction with the Department of Homeland Security, was blandly worded and low-key in tone.

But privately some analysts are worried about the blunt new message from Zawahiri, the deputy to Osama bin Laden. "It's a little spooky," said one senior official. Seeking to exploit a worldwide Muslim backlash over recent Israeli bombing strikes in Gaza, Zawahiri exhorted followers to "attack the interest of the Jews and the Americans." He then added, "Select your targets, collect the appropriate funds, assembly your equipments, plan [your attacks] accurately, and then charge toward your targets ... There is no place today for those who claim that the battlefield with the Jews is limited to Palestine."

Counterterrorism officials and analysts have been debating for the last few days whether Zawahiri's directive to "select your targets" was a direct command to operatives in the field or a more general incitement to sympathizers.

Evan Kohlmann, a government counterterrorism consultant who studies Al Qaeda messages, says the new tape seemed "palpably different" from Zawahiri's usually fiery anti-American tirades. "It's quite rare that he would be this direct and blunt about it," Kohlmann says. "My personal opinion is when he said this"—referring to the "select your targets" line—he "wasn't talking in the abstract, he was saying, 'We're doing it.' It was very much a call to arms."

But counterterrorism officials say that they have no idea what "it" might be—or any hard indicator that a major Al Qaeda strike is imminent, at least not in the United States. There has been no spike in terrorist "chatter" picked up by U.S. surveillance in recent weeks or recent arrests suggesting an operation might be underway, said one official who asked not to be identified talking about intelligence information.

But Europe may be another story. One development cited in today's FBI intelligence bulletin is the imminent release of an anti-Muslim video by Geert Wilders, a stridently right-wing member of the Dutch parliament who has made a point of baiting the country's Muslims. Wilders has said he will release the film, which is expected to directly criticize the Koran, by April 1. Dutch authorities, bracing for a backlash, recently increased their security threat level from "limited" to "substantial."

"There is a real possibility of a terrorist attack in the Netherlands," the Dutch counterterrorism office now states on the home page of its Web site.

Today's FBI/Homeland Security bulletin, called a "Joint Homeland Special Assessment," makes no such dire warnings. It does note that Al Qaeda, despite setbacks, has been able to maintain a

"robust media and propaganda capability" evidenced by a steady increase in the number of audio- and videotapes from the terror group's leaders. The number of such tapes released by Al Qaeda's As-Sahab media arm jumped from 58 in 2006 to 97 in 2007—with 12 new ones so far in 2008. Just before Zawahiri's tape appeared, Osama bin Laden surfaced in his own audiotape. Like Zawahiri, he too invoked the "siege laid upon Gaza" and other recent developments. "The recent wave of audio statements from Osama bin Laden and Ayman Al-Zawahiri over the past week attempts to capitalize on flashpoints—the Israeli-Palestinian conflict, Iraq and the Danish cartoon controversy—to inspire others to take violent action against what they believe are transgressions against Muslims worldwide," the FBI bulletin states. Among developments that could trigger more such tapes, the FBI bulletin says, are the U.S. presidential election and the release of Wilders film.

One big concern among FBI officials is that the tapes are registering with terrorist "wannabes" and other sympathizers inside the United States. "It's the home-grown guys who are downloading this stuff and watching them on their computers," says Richard Kolko, an FBI spokesman.

URL: http://www.newsweek.com/id/129176

ATTACHMENT E

Breaking News **New homes sales fell in February for a fou 13-year low.**

updated 9:46 a.m. EDT, Sat March 22, 2008

Yemen official: Al Qaeda behind attempt on U.S. Embassy

STORY HIGHLIGHTS
- Mortar strike targeted U.S. Er
- Instead, hit nearby school an
- Official said militant launched
- Al Qaeda blamed for deadly 2

Next Article in World »

SANAA, Yemen (AP) – An al Qaeda terror cell was behind a mortar strike against the U.S. Embassy in Yemen that missed its target but killed a security guard and wounded 13 students at a nearby school, an Interior Ministry official said Saturday.

Yemeni forces train in counterterrorism after a mortar hit a school, killing one and seriously wounding 13 girls.

The official, speaking on customary condition of anonymity, said al Qaeda militant Hamza al-Dayan launched three mortars at the embassy Tuesday before fleeing in a vehicle with three accomplices.

The mortar shells crashed into the school in the downtown Sawan district of Sanaa, killing the security guard and wounding 13 schoolgirls, three grievously.

On Thursday, the police arrested five suspects in the attack. It was not clear if they have any connection to al-Dayan and his men, who remain at large.

U.S. officials did not immediately respond to a request for comment on Saturday. The embassy has informed its nonessential staff they are permitted to leave Yemen if they want to.

The heavily guarded U.S. Embassy in Yemen has been targeted in the past.

Attachment E.
AE 136 (Hamdan)
Page 1 of 2

Don't Miss

- U.S. Embassy in Yemen believed target of attack

embassy grounds a day after Vice President Dick Cheney made a stop for talks with officials at the Sanaa airport.

The attacker, who apparently was seeking to retaliate against what he called American bias toward Israel, was sentenced to 10 years in prison but the sentence was later reduced to seven years.

In March 2003, two people were shot to death and dozens more were injured as police clashed with demonstrators trying to storm the embassy when tens of thousands rallied against the U.S.-led invasion of Iraq.

In 2006, a gunman opened fire outside the embassy but was shot and arrested by Yemeni guards. The gunman, armed with a Kalashnikov rifle, claimed he wanted to kill Americans.

Al Qaeda has an active presence in Yemen despite government efforts to destroy it.

The group was blamed for the 2000 bombing of the USS Cole destroyer in the Yemeni port of Aden that killed 17 American sailors and an attack on a French oil tanker that killed one person two years later. E-mail to a friend

All About Al Qaeda • Yemen • USS Cole

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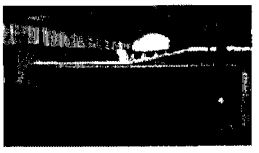
▸ **From the Blogs:** Controversy, commentary, and debate

Top News

China upset over U.S. missile part shipment



Volunteers hold back floods

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ATTACHMENT F

Recent Embassy Notices for American Citizens

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International Travel Home

A-Z Index of Topics

New Requirements for U.S. Citizens

International Travel Information

Tips for Traveling Abroad

Document Requirements

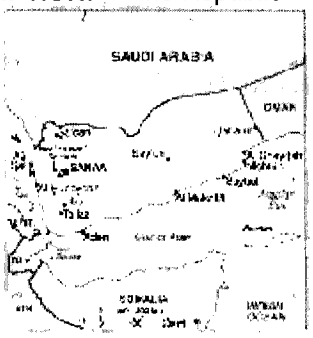
Living Abroad Tips

Additional Resources

About Overseas Citizens' Services

December 27, 2007

COUNTRY DESCRIPTION: The Republic of Yemen was established in 1990 following unification of the former Yemen Arab Republic (North) and the People's Democratic Republic of Yemen (South). Islamic [redacted]d traditional ideals, beliefs, and practices provide the foundation of the country's customs and laws. Yemen is a developing country and modern tourist facilities are widely available only in major cities. Read the Department of State Background Notes on Yemen for additional information.



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ENTRY/EXIT REQUIREMENTS: Passports and visas are required for travel to Yemen. Visas may be obtained at Yemeni Embassies abroad; all travelers to Yemen can also potentially obtain entry visas at ports of entry. Travelers to Yemen are no longer required to have an affiliation with and arrange their travel

length of stay. Upon arrival at ports of entry, travelers may be issued a visa valid for a maximum of three months.

Yemeni law requires that all foreigners traveling in Yemen obtain exit visas before leaving the country. In cases of travelers with valid tourist visas and without any special circumstances (like those listed below), this exit visa is obtained automatically at the port of exit as long as the traveler has not overstayed the terms of the visa.

In certain situations, however, foreigners are required to obtain exit visas from the Immigration and Passport Authority headquarters in Sanaa. These cases may include, but are not limited to, foreigners who have overstayed the validity date of their visa; U.S.-citizen children with Yemeni or Yemeni-American parents who are not exiting Yemen with them; foreigners who have lost the passport containing their entry visa; foreign residents whose residence visas are based on their employment or study in Yemen, marriage to a Yemeni citizen, or relationship to a Yemeni parent; or foreign residents who have pending legal action (including court-based "holds" on family members' travel). All minor/underage U.S. citizens should be accompanied by their legal guardian(s) and/or provide a notarized letter in Arabic of parental consent when obtaining exit visas to depart Yemen. In all of these more complex cases, obtaining an exit visa requires the permission of the employing company, the sponsoring Yemeni family member, the sponsoring school or the court in which the legal action is pending. Without this permission, foreigners -- including U.S. Citizens -- may not be allowed to leave Yemen.

American women who also hold Yemeni nationality and/or are married to Yemeni or Yemeni-American men often must obtain permission from their husbands for exit visas. They also may not take their children out of Yemen without the permission of the father, regardless of who has custody (see Special Circumstances section below).

For more details, travelers can contact the Embassy of the Republic of Yemen, Suite 705, 2600 Virginia Avenue NW, Washington, D.C. 20037, telephone 202-965-4760; or the Yemeni (Mission to the U.N., 866 United Nations Plaza, Room 435, New York, NY 10017, telephone (212) 355-1730. Visit the Yemeni Embassy home page for more visa information at

information about customs regulations, please read our Customs Information sheet.

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SAFETY AND SECURITY: The Department of State is concerned that al-Qa'ida and its affiliates are actively engaged in extremist-related activities in Yemen and the Arabian Peninsula.
The Department remains concerned about possible attacks by extremist individuals or groups against U.S. citizens, facilities, businesses and perceived interests. On July 2, 2007, suspected al-Qa'ida operatives carried out a vehicle-borne explosive device attack on tourists at the Belquis Temple in Marib, which resulted in the deaths of eight Spanish tourists and two Yemenis. The targeting of tourist sites by al-Qa'ida may represent an escalation in terror tactics in Yemen. On February 3, 2006, 23 convicts, including known affiliates of al-Qa'ida, escaped from a high-security prison in the capital city, Sanaa. Among the al-Qa'ida associates were individuals imprisoned for their roles in the 2000 bombing of the USS Cole and the 2002 attack on the French oil tanker Limburg. In the weeks following the escape, some prisoners voluntarily turned themselves in to authorities; to date, however, some escapees remain at large. Two of the escapees were killed in vehicle-based suicide attacks on oil facilities near Mukalla and Marib on September 15, 2006. Those attacks were followed by the arrest the next day in Sanaa of four suspected al-Qa'ida operatives, who had stockpiled explosives and weapons. On December 5, 2006, a lone gunman opened small arms fire outside of the Embassy compound during the early morning hours. The assailant, wounded by host-nation security personnel and subsequently arrested, was the sole casualty. It appears that, although the gunman was influenced by extremist ideology, he worked alone in planning and executing the attack.

Americans should avoid areas where demonstrations are taking place. A 2005 demonstration against an increase in the fuel price led to two days of widespread demonstrations and rioting throughout Sanaa and other cities. Those demonstrations resulted in a large amount of property damage, looting, and several roadblocks.

The summer and fall of 2007 witnessed an increase in anti-government demonstrations in

should be aware of the potential for further demonstrations when traveling in these areas.

Throughout the country, U.S. citizens are urged to exercise particular caution at locations associated with foreigners, such as the Sanaa Trade Center, American-affiliated franchises, restaurants and shops in the Hadda area of Sanaa, in Aden and elsewhere, and at restaurants and hotels frequented by expatriates. From time to time, the U.S. Embassy in Sanaa may temporarily close or suspend public services as necessary to review its security posture and ensure its adequacy.

In addition, U.S. citizens are urged to avoid contact with any suspicious, unfamiliar objects, and to report the presence of such objects to local authorities. Vehicles should not be left unattended and should be kept locked at all times.
U.S. Government personnel overseas have been advised to take the same precautions.
Americans in Yemen are urged to register and remain in contact with the American Embassy in Sanaa for updated security information (see section on Registration/Embassy location below).
Yemeni government security organizations have arrested and expelled foreign Muslims, including Americans, who have associated with local Muslim organizations considered to be extremist by security organs of the Yemeni government. Americans risk arrest if they engage in either political or other activities that violate the terms of their admission to Yemen.

Travel on roads between cities throughout Yemen can be dangerous. Armed carjacking, especially of four-wheel-drive vehicles, occurs in many parts of the country, including the capital.
Yemeni security officials advise against casual travel to rural areas. The U.S. Embassy sometimes restricts the travel of its own personnel to rural areas, while the Government of Yemen also sometimes places restrictions on Americans traveling outside Sanaa. Please check with the Embassy for the latest restrictions.

Travel is particularly dangerous in the tribal areas north and east of Sanaa. Armed tribesmen in those areas have kidnapped a number of foreigners in attempts to resolve disputes with the Yemeni government. Hostilities between tribesmen and government security forces in the Sadah governorate north

Travel by boat through the Red Sea or near the Socotra Islands in the Gulf of Aden presents the risk of pirate attacks. If travel to any of these areas is necessary, travelers may reduce the risk to personal security if such travel is undertaken by air or with an armed escort provided by a local tour company.

Other potential hazards to travelers include land mines and unexploded ordnance from the 1994 civil war. This is of particular concern in areas where fighting took place in the six southern provinces. However, most minefields have been identified and cordoned off. Americans are most vulnerable to terrorist attacks when they are in transit to and from their residences or workplaces, or when they are shopping, sightseeing, or visiting friends. All Americans are reminded to vary their routes and times, remain vigilant, report suspicious incidents to the Embassy, avoid areas that Westerners and Americans frequent, avoid traveling after dark, lock car windows and doors, and carry a cell phone.

Based on previous abductions of foreigners in Iraq, Afghanistan and Kuwait, the Embassy recommends that Americans with doubts about the identity of security or police personnel on the roads remain in their vehicles, roll up their windows, and contact the Embassy. For additional information on travel by road in Yemen, see the Traffic Safety and Road Conditions section below.

For the latest security information, Americans traveling abroad should regularly monitor the Department's web site, where the current Worldwide Caution, Middle East and North Africa Travel Alert, Travel Warnings and other Travel Alerts can be found. In addition, recent Embassy Warden Messages, directed towards the resident American community, are posted online at http://yemen.usembassy.gov/yemen/citizen_services.html.

Up-to-date information on safety and security can also be obtained by calling 1-888-407-4747 toll free in the U.S. and Canada, or for callers outside the U.S. and Canada, a regular toll-line at 1-202-501-4444. These numbers are available from 8:00 a.m. to 8:00 p.m. Eastern Time, Monday through Friday (except U.S. federal holidays).

The Department of State urges American citizens to take responsibility for their own

the Department of State's pamphlet A Safe Trip Abroad.

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CRIME: The most serious problem affecting travelers to Yemen is carjacking. Travelers have rarely been victims of petty street crime.

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INFORMATION FOR VICTIMS OF CRIME:
The loss or theft abroad of a U.S. passport should be reported immediately to the local police and the nearest U.S. Embassy or Consulate. If you are the victim of a crime while overseas, in addition to reporting to local police, please contact the nearest U.S. Embassy or Consulate for assistance. The Embassy/Consulate staff can, for example, assist you to find appropriate medical care, contact family members or friends, and explain how funds could be transferred. Although the investigation and prosecution of the crime is solely the responsibility of local authorities, consular officers can help you to understand the local criminal justice process and to find an attorney if needed.
See our information on Victims of Crime.

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MEDICAL FACILITIES AND HEALTH INFORMATION: Lack of modern medical facilities outside of Sanaa and Aden and a shortage of emergency ambulance services throughout the country may cause concern to some visitors. Doctors and hospitals often expect immediate cash payment for health services. An adequate supply of prescription medications for the duration of the trip is important. While many prescription drugs are available in Yemen, a particular drug needed by a visitor may not be available.
The U.S. Embassy in Sanaa strongly advises all American citizens residing in or traveling to Yemen to ensure that they have received all recommended immunizations (see below).

Information on vaccinations and other health precautions, such as safe food and water precautions and insect bite protection, may be obtained from the Centers for Disease Control and Prevention's hotline for international travelers at 1-877-FYI-TRIP (1-877-394-8747) or via the CDC's internet site at http://wwwn.cdc.gov/travel/default.aspx. For information about outbreaks of infectious

http://www.who.int/ith/en/.

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MEDICAL INSURANCE: The Department of State strongly urges Americans to consult with their medical insurance company prior to traveling abroad to confirm whether their policy applies overseas and whether it will cover emergency expenses such as a medical evacuation. Please see our information on medical insurance overseas.

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TRAFFIC SAFETY AND ROAD CONDITIONS: While in a foreign country, U.S. citizens may encounter road conditions that differ significantly from those in the United States. The information below concerning Yemenis provided for general reference only, and may not be totally accurate in a particular location or circumstance.

Based on previous abductions of foreigners in Iraq, Afghanistan and Kuwait, the Embassy recommends that Americans with doubts about the identity of security or police personnel on the roads remain in their vehicles, roll up their windows, and contact the Embassy. For additional information addressing security concerns for Americans in Yemen, please see the Safety and Security section above.

Travel by road in Yemen should be considered risky. Within cities, minivans and small buses ply somewhat regular routes, picking up and dropping off passengers with little notice or regard for other vehicles. Taxis and public transportation are widely available but the vehicles may lack safety standards and equipment. Embassy personnel are advised to avoid public buses for safety reasons. Despite the presence of traffic lights and traffic policemen, drivers are urged to exercise extreme caution, especially at intersections. While traffic laws exist, they are often not enforced, and/or not adhered to by motorists. Drivers sometimes drive on the left side of the road, although right-hand driving is specified by Yemeni law. No laws mandate the use of seat belts or car seats for children. The maximum speed for private cars is 100 kilometers per hour (62.5 miles per hour), but speed limits are rarely enforced. A large number of under-age drivers are on the roads. Many vehicles are in poor repair and lack basic parts such as

inter-city roads, which are usually paved and in fair condition, the rural roads in general require four-wheel-drive vehicles or vehicles with high clearance.

Yemeni security officials advise against casual travel to rural areas. The U.S. Embassy sometimes restricts the travel of its own personnel to rural areas, while the Government of Yemen also sometimes places restrictions on Americans traveling outside Sanaa. Please check with the Embassy for the latest restrictions.

Travelers should take precautions to avoid minefields left over from Yemen's civil wars. Traveling off well-used tracks without an experienced guide could be extremely hazardous, particularly in parts of the south and the central highlands.

Penalties for driving under the influence of alcohol or drugs, and reckless driving which causes an accident resulting in injury, are a fine and/or prison sentence. If the accident results in death, the driver is subject to a maximum of three years in prison and/or a fine. Under traditional practice, victims' families negotiate a monetary compensation from the driver proportionate to the extent of the injuries -- higher if it is a fatality.
Please refer to our Road Safety page for more information and visit the web site of Yemen's national tourism office and national authority responsible for road safety at http//yementourism.com.

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AVIATION SAFETY OVERSIGHT: As there is no direct commercial air service between the United States and Yemen, the U.S. Federal Aviation Administration (FAA) has not assessed Yemen's Civil Aviation Authority for compliance with International Civil Aviation Organization (ICAO) aviation safety standards. For more information, travelers may visit the FAA's web site at http://www.faa.gov/safety/programs_initiatives/oversight/iasa.

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SPECIAL CIRCUMSTANCES: Photography of military installations, including airports, equipment, or troops is forbidden. In the past, such photography has led to the arrest of U.S. citizens. Military sites are not always obvious.

teller machines (ATMs) are being introduced in major cities but are still not widely available in Yemen. Credit cards are not widely accepted. The Government of Yemen may not recognize the U.S. citizenship of persons who are citizens of both Yemen and the United States. This may hinder the ability of U.S. consular officials to assist persons who do not enter Yemen on a U.S. passport. Dual nationals may also be subject to national obligations, such as taxes or military service. For further information, travelers can contact the nearest embassy or consulate of Yemen.

American citizens who travel to Yemen are subject to the jurisdiction of Yemeni courts, as well as to the country's laws, customs, and regulations. This holds true for all legal matters including child custody. Women in custody disputes in Yemen may not enjoy the same rights that they do in the U.S., as Yemeni law often does not work in favor of the mother. Parents planning to travel to Yemen with their children should bear this in mind. Parents should also note that American custody orders might not be enforced in Yemen.

American women who also hold Yemeni nationality, and/or are married to Yemeni or Yemeni-American men, are advised that if they bring their children to Yemen they may not enjoy freedom of travel should they decide they want to leave Yemen. Such women often must obtain permission from their husbands for exit visas. They also may not take their children out of Yemen without the permission of the father, regardless of who has custody (See Entry/Exit Requirements section above).

American students and workers in Yemen sometimes report that the sponsors of their residence permits seize their U.S. passports as a means of controlling their domestic and international travel. While the sponsors say they seize the passports on behalf of local security services, there is no law or instruction from Yemeni passport or security offices requiring that passports be seized.
Please see our Customs Information.

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CRIMINAL PENALTIES: While in a foreign country, a U.S. citizen is subject to that country's laws and regulations, which sometimes differ significantly from those in the United States and may not afford the protections available to the individual under

arrested, or imprisoned. Penalties for possession, use, or trafficking in illegal drugs in Yemen are severe, and convicted offenders can expect long jail sentences and heavy fines. The use of the mild stimulant "qat" is legal and common in Yemen, but it is considered an illegal substance in many other countries, including the United States.
Engaging in sexual conduct with children or using or disseminating child pornography in a foreign country is a crime, prosecutable in the United States.
Please see our information on Criminal Penalties.

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CHILDREN'S ISSUES: For information see our Office of Children's Issues web pages on intercountry adoption and international parental child abduction.

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REGISTRATION / EMBASSY LOCATION:
Americans living or traveling in Yemen are encouraged to register with the nearest U.S. Embassy or Consulate through the State Department's travel registration web site, and to obtain updated information on travel and security within Yemen. Americans without Internet access may register directly with the nearest U.S. Embassy or Consulate. By registering, American citizens make it easier for the Embassy or Consulate to contact them in case of emergency. The U.S. Embassy is located at Dhahr Himyar Zone, Sheraton Hotel District, PO Box 22347. The telephone number of the Consular Section is (967)(1) 755-2000, extension 2153 or 2266. The fax number is (967) (1) 303-175. The after-hours emergency number is (967) (1) 755-2000 (press 0 for extension) or (967) 733213509. The Embassy is open from Saturday through Wednesday.
* * *

This replaces the Country Specific Information dated March 19, 2007, to update the section on Safety and Security.

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[redacted]

From: Stone, Tim, LCDR, DoD OGC

Sent: Monday, March 31, 2008 4:02 PM

To: Prasow, Andrea, Ms, DoD OGC; [redacted]C

Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; [redacted] OGC; McMillan, Joseph M. (Perkins Coie); Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; 'Murphy, John'; Murphy, John, Mr, DoD OGC; Schneider, Harry (Perkins Coie); Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC

Subject: RE: U.S. v. Hamdan - D024 Government Response to Defense Motion to Compel Production or Depositions

Signed By: [redacted]

Attachments: D-024 Govt Response - Hamdan.pdf

To all: Here is the copy of Prosecution response to D-024.

v/r
LCDR Tim Stone

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**Defense Motion** For Employment of Expert Witness 24 March 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court and this Court's orders dated 20 December 2007 and 15 February 2008.

2. **Relief Sought:** Pursuant to RMC 703(d), Defendant Salim Ahmed Hamdan moves for an order authorizing the employment of Professor Brian G. Williams as an expert consultant and witness.

3. **Overview:** An accused is entitled to expert assistance before and during trial to aid in the preparation and presentation of his defense. *United States v. Gunkle,* 55 M.J. 26, 31 (C.A.A.F. 2001). The assistance and testimony of Professor Williams is necessary for Mr. Hamdan's defense on several key issues, including rebuttal of elements of both the Conspiracy and Material Support for Terrorism charges, and to establish an affirmative defense of lawful combatancy. These defenses depend in significant part on a showing that the Taliban and associated Ansar fighters conducted operations in Afghanistan a manner consistent with the law of war. Professor Williams has been previously heard by this Commission as an expert on that issue (at the 5-6 December 2007 jurisdictional hearing). In addition, Professor Williams has expertise needed by the Defense to evaluate and critique the evidence proffered by the Prosecution in its Motion to Pre-Admit the Documentary Motion Picture: *The al Qaida Plan* (P0003), produced and narrated by Mr. Evan Kohlmann. That motion picture clearly constitutes a proffer of testimony from a purported expert, as it contains opinions, commentary, and alleged historical information well outside the personal knowledge of Mr. Kohlmann.

The Convening Authority rejected the Defense's Request for Appointment of Professor

Williams as a Defense expert on the ground that "the request fails to tie Professor Williams' proposed testimony to a material issue in the case." Specifically, the Convening Authority stated that "[w]ithout evidence that Hamdan was associated with the Ansars, expert testimony [from Professor Williams] regarding the Ansars does not appear to be relevant." Convening Authority Response to Request (Attachment B). However, that Response failed to recognize that the Defense will have the opportunity to present such evidence at trial, a point already noted by this Commission: "it is still conceivable that [Mr. Hamdan] can offer 'some evidence' of each element of lawful combatancy. If he does so, he would arguably be entitled to an instruction on [that affirmative] defense. The resolution of this issue must await the presentation of evidence on the merits at trial." 7 March 2008 Ruling on Motion to Dismiss (Unlawful Combatant Status) at 2 (citations omitted). The Defense intends to present evidence at trial showing an association between Mr. Hamdan and the Ansars. The testimony of Professor Williams regarding the legitimacy of the Ansars as unit integrated into the Taliban armed forces therefore remains a critically important part of Mr. Hamdan's defense. In addition, the Response from the Convening Authority failed to address the Defense's need for Professor Williams' expertise to evaluate and critique of the testimony of Evan Kohlmann, which already has been proffered by the Prosecution in its motion to pre-admit evidence. Professor Williams' expert opinions will assist the Commission and the finders of fact in assessing the reliability and significance of Mr. Kohlmann's testimony. Accordingly, the Commission should authorize the engagement of Professor Williams to ensure a full and fair trial on all relevant issues.

4. **Burden and Standard of Proof:** The burden of persuasion on this motion rests with the moving party. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

5. **Facts:**

A. Professor Brian Williams testified before this Commission at the 5-6 December 2007 evidentiary hearing on personal jurisdiction. At that hearing, "the Defense showed, through the testimony of Professor Williams, that the Ansars were 'members of the armed forces of a Party' or members of a militia or volunteer

corps 'forming part of such armed forces.'" 19 December 2007 Order at 8. In addition, based on Professor Williams' testimony, the Commission concluded that the Taliban "had a conventional fighting force that may well be described as a traditional army," and that "[t]he Ansars comprised up to 25% of the Taliban army." *Id.* at 3. The Commission further concluded that the Ansars "were subject to a rigid command structure, were highly disciplined, usually wore a uniform (or uniform parts), and carried their arms openly." *Id.* Moreover, based on Professor Williams' testimony, the Commission found that "Osama bin-Laden contributed forces to the Ansars, and provided them with weapons, funding, propaganda and other support." *Id.*

B. On 15 February 2008, the Prosecution moved to pre-admit an affidavit of Evan Kohlmann and a seven-part movie created and narrated by Mr. Kohlmann entitled *The al Qaida Plan*. Mr. Kohlmann holds himself out as an expert on al Qaeda and he has testified as an expert witness for the Government in a number of cases in U.S. District Courts.

C. On 6 March 2008, the Defense submitted a formal Request to the Convening Authority for funding to employ Professor Williams as an expert consultant and witness. That Request set forth relevant facts and provided ample explanation to justify the engagement, without compromising attorney work product or fully disclosing the anticipated trial plan of the Defense. The Defense Request highlighted the need for Professor Williams' expertise on the nature of the hostilities in Afghanistan at the time of Mr. Hamdan's capture, and on the characteristics of the forces engaged. The Request identified particular Charges, Specifications, and elements on which Professor Williams would testify in a manner tending to disprove allegations essential to the Prosecution's case. The Request also explicitly mentioned the need to draw on Professor Williams' expertise to evaluate and respond to the testimony of the Prosecution's proffered

expert on al Qaeda, Mr. Kohlmann. The Defense requested $13,000 to employ Professor Williams for 104 hours at $125 per hour. (Letter from LCDR Mizer to the Convening Authority dated 6 March 2008, Attachment A).

D. On 12 March 2008, the Convening Authority denied the Defense Request for the expert engagement of Professor Williams. The Convening Authority asserted that the request made "an insufficient showing that Professor Williams' proposed testimony is relevant and necessary." (Convening Authority Response to Request dated 12 March 2008, Attachment B). The only explanation for the denial related to the affirmative defense of lawful combatancy, *i.e.*, the statement that "[w]ithout evidence that Hamdan was associated with the Ansars, expert testimony [from Professor Williams] regarding the Ansars does not appear to be relevant." However, the Convening Authority failed to address the relevance and necessity of Professor Williams' testimony to rebut elements of the Charges and Specifications, namely the allegations that Mr. Hamdan was conspiring with and providing weapons to terrorists. It also failed to address the need for Professor Williams' expertise to evaluate and critique the proffered testimony of Prosecution's purported expert, Mr. Kohlmann.

6. <u>Law and Argument</u>:

A. Under R.M.C. 703(d), the Military Judge Has Authority to Approve the Employment of an Expert

This Commission has the authority to approve the employment of Prof. Williams as a Defense expert, despite the initial denial of the Defense Request by the Convening Authority. Rule of Military Commission 703(d) provides, in pertinent part:

> A request denied by the convening authority may be renewed before the military judge, who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling.

Here, the Defense requests that the Military Judge approve the employment of Prof. Williams and require prompt compliance by the Government, as the Defense needs to respond to the Prosecution's motion to pre-admit the testimony of its purported expert by 11 April 2008, and needs to consult with Prof. Williams for that purpose.

B. Mr. Hamdan has a Right to Expert Assistance Necessary for the Preparation and Presentation of his Defense

The right to present a defense is a fundamental element of due process of law. *United States v. McAllister*, 64 M.J. 248, 252 (C.A.A.F. 2007). At trial, an accused "shall have a reasonable opportunity to obtain witnesses and other evidence . . . ." 10 U.S.C. § 949j (2006); R.M.C. 703, Manual for Military Commissions (2007 ed.). But an accused's entitlement to expert assistance is not limited to expert testimony at trial. *United States v. Lee*, 64 M.J. 213, 217 (C.A.A.F. 2006). Rather, it extends to the period "before trial to aid in the preparation of his defense upon a demonstration of necessity." *United States v. Breshnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005). To demonstrate necessity, "the accused must show that a reasonable probability exists 'both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.'" *Id.* (quoting *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001)). Military courts typically apply a three-part test to determine whether expert assistance is necessary. *Id.* The Defense must show (1) why the expert is needed; (2) what the expert would accomplish for the accused; and (3) why the defense is unable, absent expert assistance, to gather or present the relevant evidence. *Id.* In this case, these criteria are easily satisfied, demonstrating Mr. Hamdan's need for the expert assistance of Professor Williams.

C. Professor Williams Will Rebut Allegations Relating to Essential Elements of the Charges

First, Professor Williams' testimony is needed to rebut allegations that go to essential elements in the Charges that Mr. Hamdan is facing. For example, Specification 1 of Charge II (Material Support for Terrorism) alleges that Mr. Hamdan provided material support for

terrorism by transporting weapons and supplies to Taliban or al Qaeda members or associates. Specification 3 of Charge II alleges that Mr. Hamdan provided material support for terrorism by "knowingly providing one or more SA-7 surface to air missiles to members of al Qaeda, Taliban or others directly associated with said organizations." Each of these offenses requires the Prosecution to prove that Mr. Hamdan provided these weapons to others, knowing that they were to be used for acts of terrorism. Professor Williams will testify that the Taliban and Ansar units in the vicinity of Kandahar (where Mr. Hamdan was captured) were part of the regular army of Afghanistan, and that they were not engaged in terrorism. Rather, they were attempting to defend territory against coalition and Northern Alliance forces in a manner consistent with armed forces engaged in conventional warfare.

Likewise, Specification 2 of Charge I (Conspiracy) alleges that Mr. Hamdan conspired with unknown members of the Taliban and al Qaeda to murder coalition pilots and airmen in violation of the laws of war. To prove this allegation, the Prosecution must establish that Mr. Hamdan provided missiles to unprivileged combatants with the intention that they be used to kill others in an armed conflict. Here again, Professor Williams will testify that the hostile forces engaged against coalition personnel in the vicinity of Mr. Hamdan's capture in November 2001 were lawful combatants, members of the armed forces of a sovereign state, and that (as found by the Commission in its 19 December 2007 Ruling) they generally conducted operations "as a traditional army." From these foundational facts, the Defense will be able to argue that, even if the Prosecution is able to show an agreement to deliver weapons to be used against coalition aircraft, no inference reasonably can be drawn that the use of such weapons would amount to attempted murder in violation laws of war. Rather, Professor Williams' testimony will be essential in showing that use of such weapons by hostile forces in the vicinity of Kandahar (by either Taliban or Ansar units), while regrettable insofar as it would have been directed at our personnel, would have been perfectly legal under the laws of war.

D. Professor Williams Will Help Mr. Hamdan Establish the Affirmative Defenses of Lawful Combatancy or Civilian Authorized to Accompany the Armed Forces

Second, this Commission has ruled that Mr. Hamdan may raise the defense of lawful combatancy if he can offer "some evidence" of each element of that defense. Motion to Dismiss (Unlawful Combatant Status) (7 March 2008) at 2. One way to do so would be to produce "some evidence that he was a member of the armed forces or a regular militia of a nation, that he wore a uniform or some other distinctive insignia or mark, that he carried arms openly, and that he and the military organization of which he was a part conducted their operations in accordance with the law of war." *Id.*

Another way to establish lawful status would be to produce some evidence that Mr. Hamdan, though not a combatant, can be deemed a POW under GPW Article 4.A(4). That provision affords POW status to "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian…supply contractors" or other civilians who have authorization to provide services to the armed forces. *See* III Geneva Convention Relative to the Treatment of Prisoners of War, Art. 4. Mr. Hamdan will raise this defense before the Commission, and once raised, "the burden shifts to the prosecution to prove beyond a reasonable doubt that the defense does not exist." *United States v. Khadr*, CMCR 07-001 (24 September 2007) at 7 (citing R.M.C. 916(b)).[1]

The Defense anticipates that at trial it will present evidence going to the affirmative defenses of lawful combatancy or lawful status under GPW Art. 4.A(4) (civilian authorized to accompany the armed forces, who has not directly engage in hostilities). For example, the Defense expects that "Sergeant A" will testify that Mr. Hamdan was captured with a letter from

[1] The Defense raised the issue of POW status at the jurisdictional / Article 5 hearing held by this Commission on 5-6 December 2007. On 19 December 2007, the Commission ruled that Mr. Hamdan was not entitled to POW status. However, that threshold ruling was made on a preponderance of the evidence standard for jurisdictional purposes only. In its 17 December 2007 Ruling on the Defense Motion for Article 5 Status Determination, the Commission specifically noted that this was merely "an initial showing of jurisdiction." It expressly stated that "[a]t trial, if the accused raises an affirmative defense, such as the defense of lawful combatancy, the Government will be required to disprove that defense beyond a reasonable doubt." 17 December 2007 Ruling at 1. The Commission reiterated this in its 7 March 2008 Ruling. Once raised, either "lawful combatancy" – which as illustrated in the 7 March 2008 Ruling can be based on the four factors set forth in GPW Art. 4.A(2) – or status as a "civilian authorized to accompany the armed forces" as set forth in GPW Art. 4.A(4), will confer lawful status and must be disproved by the Prosecution.

the Taliban government authorizing him to carry weapons in Afghanistan. This letter will be introduced by the Defense at trial. "Sergeant A" will also testify that Mr. Hamdan was captured with a two-way radio. With the aid of this radio, "Sergeant A" was able to overhear enemy communications, allowing him to determine the movements of Taliban and Ansar fighters and call in airstrikes on their positions. This will constitute "some evidence" that Mr. Hamdan was associated with lawful armed forces in the vicinity of Kandahar. While Mr. Hamdan was not wearing a military uniform at the time of his capture, the obligation to wear a uniform applies only to combatants, and even then only when combatants are actively engaged in military operations. THE MANUAL OF THE LAW OF ARMED CONFLICT, U.K. MINISTRY OF DEFENSE 42 (2004). Even in times of armed conflict, members of the armed forces may be authorized to wear civilian clothing when away from the combat zone. *Id.* The evidence suggests that Major Smith's unit seized the village of Taktebol within a matter of hours after Mr. Hamdan traveled through that village taking his wife and daughter to the border with Pakistan. Accordingly, Mr. Hamdan had no reason to believe that he was anywhere near front-line combat operations. If these facts are shown, then the finders of fact could reasonably conclude that Mr. Hamdan's capture in civilian clothing would not defeat a lawful combatancy defense. Likewise, such evidence would be perfectly consistent with a defense based on POW status under GPW Art. 4.A(4) – a civilian authorized to accompany the armed forces, but not directly involved in hostilities because of a reasonable, though mistaken, belief that the battlefield was quite distant from his location at the time of capture. That is, in Mr. Hamdan's mind, the front was somewhere north of Kandahar. The Defense may introduce additional evidence as well, including testimony from several of the so-called "High Value Detainees," that would further establish Mr. Hamdan's association with the Ansar Brigade. For example, the Defense expects to present testimony from Abdul Hadi al Iraqi, indicating that at or near the time of his capture, Mr. Hamdan was performing the occasional task of supplying Ansar units in the vicinity of Kandahar. But without Professor Williams' testimony that the Ansars were part of the armed forces of Afghanistan and that they followed the law of war, Mr. Hamdan will be unable to fully

establish these affirmative defenses, as he must introduce "some evidence" that the Ansars were a legitimate fighting force.

E. The Defense Needs Professor Williams' Assistance in Evaluating and Critiquing the Proffered Testimony of the Prosecution's Purported Expert

Third, in addition to rebutting allegations that the Prosecution relies on to establish elements of the Charges, and assisting to establish the affirmative defenses discussed above, Professor Williams is necessary to assist the Defense in evaluating and critiquing the motion picture evidence proffered by the Prosecution, which is essentially the testimony of the Prosecution's purported expert, Mr. Kohlmann.

"Where the Government has found it necessary to grant itself an expert . . . fundamental fairness compels the military judge to be vigilant to ensure that an accused is not disadvantaged by a lack of resources and denied necessary expert assistance in the preparation or presentation of his defense." *United States v. Lee*, 64 M.J. 213, 217 (C.A.A.F. 2006).

In this case, it appears that the Prosecution already has been working with Mr. Kohlmann as an expert, and it has moved to pre-admit his testimony—in the form of a documentary film—into evidence. *See* Prosecution Motion to Pre-Admit the Documentary Motion Picture (P0003). While the Prosecution appears to have employed Mr. Kohlmann for an undetermined number of hours, the Defense has been denied the opportunity to consult with an expert concerning Mr. Kohlmann's credentials and proffered testimony. This presents the classic case where "the playing field at trial is rendered even more uneven when the Government benefits from scientific evidence and expert testimony while the defense is wholly denied a necessary expert to prepare for and respond to the Government's expert." *Lee*, 64 M.J. at 217.

F. Mr. Hamdan Will Be Unable to Gather and Present the Relevant Evidence Without the Assistance of Professor Williams

Finally, with respect to the final showing necessary to obtain approval for the engagement of an expert, the Defense is unable to provide the relevant evidence without expert assistance. Professor Williams' testimony is the product of years of research, which includes

field research in Afghanistan, and goes to issues on which expert testimony would be normal and expected, namely, the nature of the conflict in Afghanistan, the forces fighting there, and facts relevant to whether they conducted operations in a manner consistent with the law of war. Thus, each of the *Bresnahan* factors is satisfied here, establishing that Professor William's testimony is relevant and necessary for Mr. Hamdan's defense. Accordingly, the Military Judge should approve the employment of Prof. Williams as a Defense expert, and require the Government to comply with an Order authorizing such employment promptly, as the Defense needs Prof. Williams' assistance to address the Prosecution's motion to pre-admit the testimony of its purported expert, Mr. Kohlmann.

7. **Request for Oral Argument:** In light of the need for prompt action to allow the Defense to meet the 11 April 2008 deadline to respond to the Prosecution's motion to pre-admit evidence, the Defense does not request oral argument.

8. **Request for Witnesses:** The Defense does not seek oral argument nor anticipate the need to call witnesses, but reserves the right to do so should the Commission elect to hear oral argument.

9. **Conference with Opposing Counsel:** The Defense has conferred with the Prosecution, whose position is: "The instant request constitutes a matter between the Defense, the Convening Authority and the Court. Once the Convening Authority speaks, the Prosecution's position is not relevant. Accordingly, the Prosecution takes no position on the requested relief."

10. **Attachments:**

A. Letter from LCDR Mizer to the Convening Authority dated 6 March 2008

B. Convening Authority Response to Request dated 12 March 2008

C. Proposed Order

Respectfully submitted,

By: _____
LCDR BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
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el
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[redacted]
Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP
[redacted]

Attachment A

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

6 Mar 08

From: LCDR Brian L. Mizer, JAGC, USN, Detailed Defense Counsel
To: Convening Authority, Office of Military Commissions

Subj: *UNITED STATES V. HAMDAN* – REQUEST FOR APPOINTMENT OF DEFENSE EXPERT CONSULTANT AND WITNESS

Encl: (1) Curriculum Vitae of Professor Brian Williams

1. Trial by military commission for Salim Hamdan has been scheduled to commence on 28 May 2008. In anticipation of trial, the Defense requests the approval of Professor Brian Williams as a consultant and as an expert witness at trial.

2. Professor Williams has a Ph. D. in Central Asian Islamic History. He is an expert on conflict in Islamic Central Asia, transnational jihadi militant movements, and al Qaeda. He has conducted extensive field research in Afghanistan and throughout the Muslim world, including Kazakhstan, Uzbekistan, Kosovo, Muslim Spain and Jordan/Israel/Egypt. He is an Associate Professor in the Department of History at the University of Massachusetts at Dartmouth and has taught at several other institutions. He has worked as a consultant for the Central Intelligence Agency and Scotland Yard. He has published a book and is a frequent contributor to scholarly journals and news magazines. His most recent publications include *Taliban Fedayeen: The World's Worst Suicide Bombers?*, Terrorism Monitor, July 19, 2007 and *Anbar's Sunni Militias: Fighting by Proxy*, Jane's Islamic Affairs, September 25, 2007. Professor Williams' *curriculum vitae* are attached to this request. The Military Judge in conjunction with Mr. Hamdan's pre-trial jurisdictional hearing regarding whether Mr. Hamdan was properly classified as an unlawful combatant, has previously accepted Professor Williams as an expert witness on the nature and character of hostilities in Afghanistan and the particular characteristics of fighting forces involved in such combat.

3. In ruling on the issue of whether or not Mr. Hamdan was an lawful combatant, the Military Judge held that "the Defense showed, through the testimony of Professor Williams, that the Ansars were 'members of the armed forces of a Party' or members of a militia or volunteer corps 'forming part of such armed forces' and that Taliban forces where 'a conventional fighting force that may well be described as a traditional army.'" While the Military Judge ultimately found that Mr. Hamdan had not presented evidence that he was in fact a member of either force and as such could not qualify as POW protections, the nature and character of hostilities in Afghanistan and the particular characteristics of fighting forces involved in such combat remain relevant to Specification 2 of Charge 1 and Specifications 3 and 4 of Charge 2 against Mr. Hamdan. Specification 2 of Charge 1 alleges that Mr. Hamdan entered into an agreement with one or more known or unknown members of al Qaeda or Taliban to commit murder in violation of the Law of War. Dr. Williams' testimony will directly rebut this allegation by showing that nature and

character of hostilities surrounding the siege of Kandahar and the particular characteristics of the enemy fighting forces involved in such combat were within the generally accepted criteria for lawful combat and as such would not give rise to a charge of murder in violation of the law of war.

4. With regards to Specification 3 of Charge 2, Dr. Williams' testimony will establish that both Taliban forces and foreign forces fighting under and with the Taliban were under control of the Taliban government, that the use of military force by these forces was not directed at protected persons, and that these forces were conventional fighting forces not involved in terrorism, thereby rebutting a charge of material support for terrorism. Finally, with regards to Specification 4, Dr. William's testimony will rebut a critical element of the Specification, namely that that the forces engaged in the defense of Kandahar at the time of the relevant hostilities were an international terrorist organization. Accordingly, because Dr. William's testimony rebuts elements of the charges against Mr. Hamdan, Dr. Williams' testimony is both relevant and necessary to Mr. Hamdan's defense at trial.

5. Additionally, the Prosecution has moved to pre-admit the testimony of Evan Kohlmann, a self-made expert on al Qaeda. The Defense requires Mr. Williams' assistance in examining Mr. Kohlmann's credentials as an expert witness. Mr. Williams may also be called to rebut Mr. Kohlmann's testimony in the event Mr. Kohlmann is found to be qualified to testify as an expert witness. "Where the Government has found it necessary to grant itself an expert...fundamental fairness compels the military judge to be vigilant to ensure that an accused is not disadvantaged by a lack of resources and denied necessary expert assistance in the preparation or presentation of his defense." *United States v. Lee*, 64 M.J. 213, 217 (C.A.A.F. 2006).

6. Professor Williams' fee is $125 per hour. The Defense anticipates requiring ten days (eighty hours of pre-trial preparation / consultation, including four hours availability for prosecution interview); two days travel time to and from Guantanamo (eight hours each) and one day of testimony (eight hours) for a total of 104 hours at the cost of $13,000.

7. In the event this request is denied, the Defense requests a written response articulating the reasons for the denial. Should you have any questions or require further information, I may be reached at 703-588-0450 or mizerb@dodgc.osd.mil.

BRIAN L. MIZER
Detailed Defense Counsel

Copy to:
LTC William Britt, OMC Prosecution
LCDR Timothy Stone, OMC Prosecution

Curriculum Vitae
Brian Williams
[redacted]

University Experience

2001-Present: Associate Professor of Islamic History, *University of Massachusetts, Dartmouth*

1999-2001: Assistant Professor of Middle Eastern History, *University of London, School of Oriental and African Studies*

1996-1999: Lecturer, Central Asian History, *University of Wisconsin*.

Policy Experience: Terrorism Analyst/Researcher

Jamestown Foundation (Foreign Policy Think Tank). Washington DC
Central Intelligence Agency. Counter-Terrorism Center. Tysons Corner
Joint Operations Intelligence Center Lackland Air Base, Texas.
Center for Afghan Peace Studies. Kabul, Afghanistan.
New Scotland Yard, London.

Education

- **Ph.D.** Central Asian Islamic History (1999) *University of Wisconsin*, Madison – (Minor: Russian History).
- **MA** Russian History (1992) *Indiana University*, Bloomington.
- **MA** Central Eurasian Studies (1990) *Indiana University*,Bloomington
- **BA** History (1988) *Stetson University*, Deland, Florida.
- **High School.** (1984), Deland, Florida.
- **Junior High.** Friar's Middle School, Bangor, Wales (UK)

BOOK

The Crimean Tatars. The Diaspora Experience and the Forging of a Nation. Leiden/Koln/Boston; Brill Academic Publishers. Inner Asian Library. 2001.

FIELD RESEARCH EXPERIENCE IN EURASIA

Turkey 1987, 1995, 2004, 2005, 2006, 2007

India and Kashmir 2007

Afghanistan 2003, 2005, 2007

Azerbaijan 2003, 2007

Kosovo, Macedonia 2001

Ukraine (Crimea) 1997

Uzbekistan 1997

Egypt, Israel, Jordan 1996

Kazakhstan/Kyrgyzstan 1995, 1996

Russian Federation 1992

Yugoslavia (Bosnia, Montenegro, Croatia) 1987

Soviet Union (Russian Federal Soviet Republic, Ukrainian SSR) 1986/87

PUBLICATIONS IN POLICY JOURNALS

"Afghanistan's Warlord Alliance." **Jane's Intelligence Digest.** November 2, 2007.

"Anbar's Sunni Militias. Fighting by Proxy." **Jane's Islamic Affairs Analyst.** September 25, 2007.

"Afghan Suicide Bombing." **Jane's Islamic Affairs Analyst.** August 2007.

"The World's Worst Suicide Bombers?" **Time Magazine** July 28, 2007 (on-line version). Originally *"Taliban Fedayeen. The World's Worst Suicide Bombers?"* **Terrorism Monitor.** Vol. 5. Issue 14. July 19, 2007.

"A Report from the Field. Gauging the Impact of Taliban Suicide Bombing." **Terrorism Monitor**. Volume 5, Issue 10. May 24, 2007.

"Cheney Attack Reveals Taliban Suicide Bomber Targeting Patterns." **Terrorism Monitor.** (Jamestown Foundation). March 1, 2007.

"Turks Join the Jihad in Iraq and Afghanistan." **Terrorism Monitor.** Volume 3, Issue 47. December 7, 2006.

"Target Dostum: The Campaign Against Northern Alliance Warlords." **Terrorism Monitor.** Vol. 3, Issue 20. (October 21, 2005).

"Turkish Volunteers in Chechnya." **Terrorism Monitor**. Vol. 7 Issue 3. (April 7, 2005)

"El Kaide Turka (Al Qaeda Turkey). Tracing an Al Qaeda Splinter Cell." **Terrorism Monitor**. Vol. 2, Issue 22. (November 19, 2004).

"Turkey's Al Qaeda Blowback." **Terrorism Monitor**. Volume 2. Issue 8. (April 23, 2004.)

"The 'Chechen Arabs': An Introduction to the Real *Al Qaeda Terrorists from Chechnya."* **Terrorism Monitor**. Volume 1. Issue 9 (Jan 15, 2004)

"Rashid Dostum. America's Secular Ally in the War on Terror." **Terrorism Monitor**. Vol. 1. Issue 5. (Nov. 20, 2003)

"Shattering the Al Qaeda-Chechen Myth (part II). **Jamestown Foundation. Chechnya Weekly**. Vol. 4. Issue 40. (November 6, 2003)

"Shattering the Al Qaeda-Chechen Myth (part I)." **Jamestown Foundation. Chechnya Weekly.** Vol. 4, Issue 35. (October 2, 2003)

"No Evidence of Chechens in Afghanistan." **Jamestown Foundation. Chechnya Weekly**. Vol. 4. Issue 33. (September 12, 2003)

"Unraveling the Links Between the Middle East and Islamic Militants in

Chechnya." **Central Asia-Caucasus Analyst.** Feb. 12, 2003.

"Shamil Basayev, Chechen Field Commander: Russia's Most Wanted Man." **Central Asia-Caucasus Analyst**. August 2, 2000.

SCHOLARLY JOURNAL PUBLICATIONS

"Valley of the Wolves, Iraq." Turkey's Popular Culture Reacts to the Unsettling Presence of the US in Iraq in Film and Novels." **Insight Turkey**. Jan.-Mar. 2006.

"Caucasus Belli: New Perspectives on Russia's Quagmire." **The Russian Review** vol. 64 (4). 2005.

"From Secessionist 'Rebels' to 'Al Qaeda Shock Brigades': Critically Assessing Russia's Efforts to Extend the Post-September 11th War on Terror to Chechnya." **Comparative Studies on South Asia, Africa, and the Middle East**. vol. 23, no. 2. 2004.

"Jihad and Ethnicity in Post Communist Eurasia. On the Trail of Trans-national Islamic Holy Warriors in Kashmir, Afghanistan, Central Asia, Chechnya and Kosovo." **Journal of Ethnopolitics**. vol. 2, no. 3-4, March/June 2003.

"Hidden Ethnocide in the Soviet Muslim Borderlands." **Journal of Genocide Research**. vol. 4. no. 3. Sept. 2002.

"The Exile and Repatriation of the Crimean Tatars." **Journal of Contemporary History**. vol. 37, issue 3. July 2002.

"Mystics, Nomads, and Heretics. The Dissemination of Heterodox Islam from Central Asia to the 13th Century Byzantine Dobruca." **International Journal of Turkish Studies**. vol. 7, no. 1-2. 2001.

"New Light on the 13th Century Ethnogenesis of the Crimean Tatars." **Journal of the Royal Asiatic Society.** vol. 11. pt. 3. Nov. 2001.

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"The Formation of a Diaspora. The Crimean Tatars of Turkey, the Balkans and Central Asia." **Bulletin of the Royal Institute of Inter-Faith Studies**. vol. 3, no. 1. Spring/Summer 2001.

"Commemorating 'The Deportation' in Post-Soviet Chechnya. The Role of Memorialization and Collective Memory in the 1994-1996 and 1999-2000 Russo-Chechen Wars." **History and Memory.** vol. 12, No. 1 Spring/Summer 2000.

"Dar al-Harb. The 19th Century Crimean Tatar Migrations from Russia to the Ottoman Empire." **Cahiers du Monde Russe.** (Journal of the Russian World.) vol. 41 no. 1, January-March 2000.

"The Crimean Tatar exile in Central Asia: A Case Study in Group Destruction and Survival." **Central Asian Survey.** vol. 17, number 2, June 1998.

"A Community Reimagined. The Role of "Homeland" in the Forging of National Identity, the Case of the Crimean Tatars." **Journal of Muslim Minority Affairs.** vol. 17 number 2. Fall 1997.

CHAPTERS IN EDITED BOOKS

"Allah's Foot soldiers. The Role of Foreign Fighters in Chechnya's Insurgencies." in **Ethno-Nationalism, Religion and State in the North Caucasus**. Praeger; London/New York. ed. by Moshe Gammer 2007.

"The Failure of Al Qaeda Basing Attempts from Afghanistan to Iraq." in **Denial of Sanctuary. Understanding Terrorist Safe Havens.** ed. by Michael Innes. Praeger; London/New York. 2007.

"Crushing Wahhabi Fundamentalists in Central Asia and the Caucasus. Sub-Plot to the War on Al-Qaeda Terrorism or Suppression of Religious Opposition?" in **New Religious Movements in the 21st Century**. edited by Phillip Lucas and Thomas Robbins. New York; Routledge. 2004.

"Ismail Gaspirali on Tatar Emigration to the Ottoman Empire." Chapter V. in **Modern Middle East Source Book**. ed. Ben Fortna et. al. University of Michigan Press. 2004.

"Constructing the 'Green Isle.' Changing Notions of Territory and Homeland Among the Crimean Tatars." in **Cultural Interaction and Conflict in Central and Inner Asia.** University of Toronto Press. 2004.

"Ismail Gaspirali'nin Mirasini Yeniden Yorumlamak. Kirimin Atatürkü mü, Rus Ibirlikçisi mi Yoksa Rusya Imparatorluiuna Pan-Türkçü Bir Tehdit mi?" in **Ismail Bey Gaspirali Için.** Ankara, Turkey. Anadolu-Kirim Dernegi.

2004. (In Turkish).

"The Deportation and Ethnic Cleansing of the Crimean Tatars." in **Ethnic Cleansing in Twentieth Century Europe**. edited by Steven Vardy and Hunt Tooley. New York; Columbia University Press. 2003.

RESEARCH IN THE MEDIA

Washington Post: "Losing Afghanistan, Once Civilian at a Time." Nov. 18, 2007.

Time Magazine: "The World's Worst Suicide Bombers?" July 28, 2007.

UPI (United Press International): "Analysis. Afghan Hearts and Minds Part Two." June 8, 2007.
Boston Globe/ Washington Post: "Arab Militants Join Fight in Afghanistan." June 24, 2007.

BBC: "Afghanistan's bloody new year." April 21, 2007. Features Jamestown article:

Chicago Tribune. "Taliban Wins War on Opium." September 4, 2007.

San Francisco Chronicle. "Losing What We Had Once Won." September 17, 2007.

Christian Science Monitor. "Afghan Suicide Bombing Targets Local Police." October

Asia Times (China, Hong Kong): "The World's Worst Suicide Bombers." July 25, 2007.

ANSA (Italy): "Afghanistan. USA, Italia Crea Scenario Ceceno." March 29, 2007.

Daily Times (Pakistan): "Taliban Tactics Seen as Self-Defeating." March 1, 2007.

National Post (Canada): "Taliban Suicide Bombers' Tactics Backfire." March 9, 2007.

Middle East Times (UPI): "Al Qaeda Aims for the High Ground." June 29, 2007

Information (Denmark): "Pakistanske selvmordsbombere mere hensynsløse end afghansk." October 20, 2007.

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Oxford University Press. ed. John Esposito (forthcoming 2008).

"Chechen Communities in Russia." **Ethnopolitical Encyclopedia of Europe.** *ed. by Karl Cordell. Palgrave Macmillan. New York. 2004.*

□ *"Dagestani Communities in Russia."* **Ethnopolitical Encyclopedia of Europe.** *ed. by Karl Cordell. Palgrave Macmillan. New York. 2004.*

"Gagauz. The Orthodox Christian Turks of Moldavia." **Encyclopedia of the World's Minorities**. ed. Mark Georgiev. Routledge; New York. 2004.

□ *"Kurds. A Nation Without a State."* **Encyclopedia of the World's Minorities.** ed. Mark Georgiev. Routldege; New York. 2004.□□ *"Bahcesaray."* **The Supplement to the Modern Encyclopedia of Russian, Soviet, and Eurasian History.** ed. Edward Lazzerini. Academic International Press, 2004.

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"Central Asian Nationalism." **Encyclopedia of Nationalism.** vol. 2. ed. Alexander Motyl. Academic Press. 2000. □□ *"Sheikh Shamil."* **Encyclopedia of Nationalism.**vol. 2. ed. Alexander Motyl. Academic Press. 2000. □

"The Crimea (Islam in the Crimea)." **The Modern Encyclopedia of Religion in Russia and the Soviet Union**. vol. 6. ed. Paul Steeves. Academic International Press. 1997.

"Ainu Human Sacrifices." **The Modern Encyclopedia of Religion in Russia and the Soviet Union.** vol. 1. ed. Paul Steeves. Academic International. Press.1995.

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Islam after Communism. Religion and Politics in Central Asia. by Adeeb Khalid. **Slavic Review**. (forthcoming December 2007).

The Lone Wolf and the Bear. Three Centuries of Chechen Defiance to Russian Rule. by Moshe Gammer. in **Slavonica**. Vol. 13, no. 2. 2007.

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Radical Ethnic Movements in Contemporary Europe. by Farimah Daftary et. al. **Slavic Review**. Volume 64 Number 2, Summer 2005.

--*Geography of Forced Migration in the USSR,* by Pavel Polian.
--*The Oath: A Surgeon Under Fire*, by Khassan Baiev.
Reviewed **Transitions On Line.** July 31, 2004.

Allah's Mountains. Politics and War in the Russian Caucasus, by Sebastian Smith. Reviewed **Islam and Christian Muslim Relations.** 12/1. January 2001.

Ethnic Cleansing in the Soviet Union, by J. Otto Pohl. Reviewed **Journal of Genocide Research.** vol. 2, no. 1. 2000.

National Movements and National Identity Among the Crimean Tatars, by Hakan Kirimli. Reviewed **Bulletin of the Royal Institute of Interfaith Studies**. volume 2, no. 1. 2000.

The Tatars of Crimea. Return to the Homeland, by Edward Allworth. Reviewed **Central Asia Monitor**. no. 4. 1998.

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"Al Qaeda's State Building Project in Iraq." **Etats Fragiles, Conflits et Terrorisme. Universite Laval, Quebec. November 2007**.

"Afghanistan. Re-assessing the Taliban's 2007 Spring Offensive." **Jamestown Foundation, Washington DC. June 2007.**

"Backgrounder on Islam, Suicide Terrorism and Jihad in the Middle East." **Special Operations Command. Lackland Air Base, San Antonio, Texas.** September 2006.

"The Ethnic Sub-Text To Warfare and Terrorism in the Middle East." **Club de Madrid, Democracy and Terrorism, International Conference led by Kofi Annan. Madrid, Spain.** March 2005.

"Grafting Jihad to the Chechen Insurgency. Re-assessing the Role of 'Al Qaeda' in Chechen Terrorism." **Central Asia/Caucasus Forum. Harvard University. Boston**. November 2004.

"The Role of Anti-Taliban Horsemen in the War on Terror in Afghanistan." **Central Asia/Caucasus Forum. Harvard University. Boston**. April 2004.

"Waging 'Jihad' in Chechnya. The Role of Transnational Islamic Brigades in the Chechen Secessionist Struggle." **International Institute for Strategic Studies, London.** October 2004.

"*Report from Afghanistan. Reassessing The Role of Warlords in Post-Taliban Afghanistan."* **Eurasian Studies Group. Naval War College. Newport, Rhode Island**. September 2003.

"Critically Exploring Al Qaeda Links to the Chechen Guerrilla Formations in the Current Russo-Chechen War." **Eurasian Studies Group. Naval War College. Newport, Rhode Island.** September 2002.

"Symbolic and Practical Dimensions of the Territorial Discourse in the Middle East: A Comparative Analysis." **The Herzog Center for Middle Eastern History and Diplomacy. Ben Gurion University, Israel. European University Institute, Florence, Italy.** December 2001.

"The Demographic Structure of the Ottoman Empire in the Late 19th and 20th c." Chair. United Kingdom Council of Turkish Students Society. **London School of Economics. London.** January 2001.

"Ethnic Cleansing in the USSR. The Case of the Crimean Tatars." **London School of Economics, Russian and East European Political Science Forum. London**. January 2001.

"Jihad in the Caucasus. The Role of the Middle East in the Second Russo-Chechen War." **University of London, Middle Eastern History Forum. London**. September 2000.

PAPERS GIVEN AT ACADEMIC CONFERENCES

"Tracing the 'Iraq Effect' in the 'Forgotten War' in Afghanistan." **Istanbul Conference on Democracy and Global Security (Hosted by Turkish government). Istanbul. June 2007.**

"Understanding Jihadi Terrorism Sanctuaries in Afghanistan, Kashmir, Bosnia, Chechnya, Somalia and Iraq." **International Symposium on Global Crises. Fletcher School. Tufts University. Boston. March 2007.**

"Warlord. Dostum and the Uzbek Militias of Northern Afghanistan, 1979-2005." **10th Annual World Convention of the Association for the Study of Nationalities. Columbia University, New York**. March 2006.

"Jihad and Dezinformatsiia: Critically Assessing Russia's War on Militant Islam from Afghanistan to Chechnya." **Central Eurasian Studies Society 6th Annual Convention**. **Boston University, Boston.** October 2005.

"Operation Enduring Freedom, 2001-2005. Waging Counter-Jihad in Post-Taliban Central Asia." **46th Annual International Studies Association Conference, Honolulu Hawaii.** March 2005.

"Dostum. Living With a Warlord in Afghan Turkestan." (Extraordinary two hour video presentation/discussion) **8th Annual World Convention of the Association for the Study of Nationalities. Columbia University, New York**. April 2004.

"Quagmire. Critically Assessing the Second Russo-Chechen War." **Central Eurasian Studies Society 4th Annual Conference**. **Harvard University, Boston**. October 2003.

"Assessing Islamism and Terrorism, Angles in Chechnya and Palestine." **The Japan Center for Conflict Prevention. E Symposium. Tokyo, *Japan*.** May 2003.

"The Chechen Resistance. Freedom Fighters or Al Qaeda-Sponsored Terrorist Movement." **7th Annual World Convention for the Study of Nationalities. Columbia University, New York.** April 2003.

"The Forced Migration of the Crimean Tatars." **International Conference on Forced Migration. University of Bath. Bath. England** September 2002.

"The Role of Ethnic Cleansing in Crimean Tatar History. A Critical

Reinterpretation." **3rd Annual Conference of the Central Eurasian Studies Society. Madison, Wisconsin.** October 2002.

"The Hidden Ethnic Cleansing of Muslims in the Soviet Union." **American Historical Association Annual Meeting. San Francisco.** January 2002.

"Ethnocide in the USSR. The Crimean Tatar Exile in Central Asia." **6th Annual World Convention for the Study of Nationalities. Columbia University, New York.** April 2001.

"Deportation and Ethnic Cleansing of the Crimean Tatars." **34th Annual History Forum. Conference on Ethnic Cleansing in Twentieth Century Europe. Duquesne University with Austin College. Pittsburgh, Pennsylvania**. November 2000.

"Ak Toprak. Ethno-political Mobilization of the Crimean Tatar Diaspora in the Republic of Turkey." **5th Annual World Convention for the Study of Nationalities. Columbia University. New York.** April 2000.

"Ethnic Cleansing of Muslim Nations in the USSR." **University of London, School of Slavonic and East European Studies and SOAS. Central Asian Studies Lecture Series. London.** February 2000.

"Ethnocide in the USSR. The Deportation of the Crimean Tatars." **Association of Genocide Scholars, 3rd Annual Convention. University of Wisconsin, Madison**. June 1999.

"Russian Colonial Rule in the Tauride and the Crimean Tatar Migrations to Turkey."**4th Annual World Convention for the Association for the Study of Nationalities. Columbia University New York.** April 1999.

"Post-Soviet Constructions of Land, Homeland and Nation in Contemporary Crimean Tatar and Uzbek National Politics." **3rd Annual World Convention for the Study of Nationalities. Columbia University, New York.** April 1998.

COURSES TAUGHT

The Ottoman Roots of Ethnic Conflict in the Balkans (MA colloquium) **University of London SOAS**

The Formation of the Ottoman Empire. **University of London SOAS**

The Middle East in the Middle Ages. **University of London SOAS**

Senior Seminar. Terrorism in the Middle East. PLO, Hezbollah, Hamas, Al Qaeda, Pakistani Jihadi Groups. **University of Massachusetts-Dartmouth.**

A History of Afghanistan from Genghis Khan to the War on Terror. **University of Massachusetts-Dartmouth.**

A History of the Russian Empire From Ivan the Terrible to Putin. **University of Massachusetts-Dartmouth.**

Introduction to Islam and Middle Eastern History. **University of Massachusetts-Dartmouth.**

A History of the Russo-Chechen Conflict. **University of Massachusetts-Dartmouth.**

Central Asia from the Formation of the Russian Empire to the Fall of the Soviet Union. **University of Massachusetts-Dartmouth.**

RESEARCH IN MEDIA

Infidels, Barbarians and Pagans. The Role of the "Other" in UAncient History. **University of Massachusetts-Dartmouth.**

Understanding Jihadi Networks, From Soviet-Afghanistan to the War in Iraq. (taught for Political Science Department). **University of Massachusetts-Dartmouth.**

Attachment B

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

12 March 2008

MEMORANDUM FOR LCDR Brian Mizer, Detailed Defense Counsel

SUBJECT: *U.S. v. Hamdan*: Response to Request for Expert Witness (Professor Williams)

I have reviewed your 6 March 2008 request to employ Professor Brian Williams as an expert witness in light of the Military Judge's Ruling on Motion to Dismiss (Unlawful Combatant Status). I conclude that your request makes an insufficient showing that Professor Williams' proposed testimony is relevant and necessary under Rules for Military Commission 703(b)(1) and (d).

According to your expert witness request, Professor Williams would testify that Taliban and Ansar forces were under the control of the Taliban government, did not direct hostilities toward protected persons, and were conventional fighting forces not involved in terrorism. The request states that Professor Williams' testimony will be relevant to rebut allegations in the charge sheet "by showing that [the] nature and character of hostilities surrounding the siege of Kandahar and the particular characteristics of the enemy fighting forces involved in such combat were within generally accepted criteria for lawful combat...."

In light of the Military Judge's ruling of 7 March 2008, the request fails to tie Professor Williams' proposed testimony to a material issue in the case. According to the ruling, in order to raise the defense of lawful combatancy, "Hamdan must show some evidence that he was a member of the armed forces or a regular militia of a nation, that he wore a uniform or some other distinctive insignia or mark, that he carried arms openly, and that he and the military organization of which he was a part conducted their operations in accordance with the law of war." Ruling on Motion to Dismiss (Unlawful Combatant Status), at 2. The request does not address any of these factors. Additionally, this appears to be a factual issue rather than one requiring expert testimony. Without evidence that Hamdan was associated with the Ansars, expert testimony regarding the Ansars does not appear to be relevant.

I encourage you to continue to pursue your request and to follow up with any concerns.

Susan J. Crawford
Convening Authority
For Military Commissions

Attachment C

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**[Proposed] Order** On Defense Motion For Employment of Expert Witness __ March 2008

1. The Defense has moved for an order compelling the employment of a defense consultant and expert witness, Professor Brian G. Williams, or, alternatively, abatement of the proceedings.

2. I find that the Defense has made the necessary showing that Professor Williams' services are both relevant and necessary.

3. Accordingly, if the Convening Authority has not approved the employment of Professor Williams within three (3) business days of the date of this Order, the proceedings will be abated.

So ordered this ____ day of March, 2008.

Keith J. Allred
Captain, JAGC, U.S. Navy
Military Judge

[redacted]

From: [redacted], LTC, DoD OGC
Sent: Monday, March 24, 2008 6:06 PM
To: Prasow, Andrea, Ms, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC; [redacted]'; Murphy, John, Mr, DoD OGC
Cc: Berrigan, Michael, Mr, DoD OGC; Cox, Dale, MSgt, DoD OGC; David, Steven, COL, DoD OGC; [redacted]; 'McMillan, Joseph M. (Perkins Coie)'; Morris, Lawrence, COL, DoD OGC; 'Murphy, John'; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC; [redacted], DoD OGC
Subject: Filing Designation: D-025 Motion for Employment of Expert Witness - U.S. v. Hamdan

All parties,

The filing designation for the 24 March 08 Defense Motion for Employment of Expert Witness is D-025 Motion for Employment of Expert Witness - Hamdan. All future communications - whether in hard copy or by email - concerning this motion will use the filing designation as a reference in addition to the name of the filing. See RC 5.3:

3. Filing designation and future communications or filings.

a. Once a filing designation has been assigned, all future communications - whether in hard copy or by email - concerning that series of filings will use the filing designation as a reference in addition to the name of the filing. This includes adding the initial file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments. Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: "P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith." The filename of the filings shall be the same as the response being sent.

* The filename of a document that is an attachment to the response should read: "P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr Smith."

v/r,

LTC [redacted], USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From: Prasow, Andrea, Ms, DoD OGC
Sent: Monday, March 24, 2008 16:21
To: [redacted]
Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; [redacted]

[redacted]

LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Schneider, Harry (Perkins Coie); Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC
Subject: U.S. v. Hamdan - Defense Motion for Employment of Expert Witness

LTC[redacted]

Attached for filing in the case of *United States v. Hamdan* please find Defense Motion for Employment of Expert Witness. The PDF version is signed and includes attachments; the Word version is unsigned and does not include attachments. Also attached as a separate Word document is the Proposed Order, which can be found in PDF at Attachment C.

Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
[redacted]

[redacted]2008

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D-025
GOVERNMENT'S RESPONSE

To the Defense Motion for Employment of Expert Witness

31 March 2008

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b).

2. Relief Requested: The Government respectfully submits that the Defense motion for employment of expert witness should be denied.

3. Overview: Defense requests the Military Judge order authorizing the employment of Professor Brian G. Williams as an expert consultant and witness. Defense made a timely request for the authorization of Dr. Williams in accordance with Military Commission rules and the times established by the Commission. The Defense requests Dr. Williams serve as an expert witness regarding "the Ansars" and the defense of lawful combatancy as well as serve as an expert consultant to address the al Qaeda video the Prosecution intends to offer at trial. The Convening Authority rejected the request for the employment of Dr. Williams as an expert witness because the Defense failed to proffer testimony that would be relevant to a defense in issue. The Defense fails to articulate, with sufficient detail, why Dr. Williams would be necessary as an expert consultant.

4. Burden and Persuasion: Defense bears the burden of persuasion. *See* RMC 905(c)(2)(A).

5. Facts: For the purpose of this motion, the Government submits that the facts established by the Government witnesses during the Jurisdictional Hearing, 5-7 December 2007, are controlling as to the issues raised by this Motion.

6. Discussion:

a. Dr. William's expertise can not raise the defense of lawful combatancy and is therefore irrelevant.

The objection to Dr. Williams' testimony as an expert witness lays not in whether he possesses specialized knowledge or could otherwise be qualified. The issue is whether Hamdan can raise the issue of lawful combatancy; in other words, whether he was a lawful combatant simply due to the existence of an organization that the defense characterizes as "the Ansars." The Commission found, by a preponderance of the evidence, that Hamdan was an unlawful combatant.[1] Accordingly, Hamdan may only

[1] D015 Ruling on Motion, 7 MAR 2008, p. 2.

raise this defense if he shows that he was a member of the armed forces or a regular militia of a nation, that he wore a uniform or some other distinctive insignia or mark, that he carried arms openly, and that he and the military organization of which he was a part conducted their operations in accordance with the law of war. As this is a factual matter, Dr. Williams can offer no assistance to the Defense unless he was in a position to observe Hamdan during the charged period...which obviously he can not.

b. Defense proffer does not invoke the Defense of Combatant Immunity, thus the Defense is not entitled to the production of Dr. Williams.

The Defense intends to assert the defense of lawful combatancy by introducing evidence that the accused was a "supply contractor" for the Ansars and that the accused deserves prisoner of war status under the third Geneva Convention. *Defense motion page 7.* The Military Judge's ruling premised the use of a lawful combatant defense upon the showing of some evidence that an accused somehow belonged to a lawful organization. The undisputed facts show that the accused openly admits that he was taking an active part in hostilities while not wearing a uniform, nor did the accused have a uniform with him. These admissions foreclose the Defense position that it will be entitled to the Defense of combatant immunity. Thus, Williams' proposed testimony is not relevant.

c. Dr. Williams is not needed as an Al Qaeda consultant for "The Al Qaeda Plan"

The Defense also cites the need to consult Dr. Williams regarding the Prosecution's proposed video evidence titled, "The Al Qaeda Plan." Defense posits that it is incapable of properly preparing a defense without the use of an expert consultant, in this case, Dr. Williams.

Defense is not automatically entitled to expert assistance, even when the Prosecution employs one. *See United States v. Washington, 46 M.J. 477(1977).* Rather, the Defense needs a showing of necessity. *United States v. Anderson, 47 M.J. N.C. Ct Crim. App. 1997).* This showing of necessity is further defined in United States v. Thomas, 41 M.J. 873 (N.M. Ct. Crim App. 1997) in which the court places an affirmative duty upon the Defense to try to individually educate itself on the issues before the court.

In the case at bar, the Defense failed to articulate with any specificity why Dr. Williams would otherwise be needed as a consultant prior to litigating the issue of the pre-admission of "The al-Qaeda Plan." While "The Al-Qaeda Plan" is a vehicle for the introduction of evidence that outlines the al-Qaeda conspiracy. It is a straight forward recitation of information and statements and video made by al Qaeda and publicly available. As such, litigating the al Qaeda plan is a motion primarily factual based and not requiring expert assistance.

7. Oral Argument: The Defense waived oral argument and the Prosecution does no request oral argument.

8. Witnesses and Evidence: This motion can be resolved without additional testimony or argument.

9. Cerrtificate of Conference: Not applicable.

10. Additional Information: None.

Respectfully Submitted,

William B. Britt
Lieutenant Colonel, U.S. Army
Prosecutor

Timothy D. Stone
Lieutenant Commander, U.S. Navy
Assistant Prosecutor

/s/
John Murphy
Assistant U.S. Attorney
Assistant Prosecutor

/s/
Clayton Trivett, Jr.
Assistant Prosecutor

[redacted]

From: Stone, Tim, LCDR, DoD OGC

Sent: Monday, March 31, 2008 5:06 PM

To: Stone, Tim, LCDR, DoD OGC; Prasow, Andrea, Ms, DoD OGC; [redacted], LTC, DoD OGC

Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; [redacted] DoD OGC; David, Steven, COL, DoD OGC; [redacted], LN1, DoD OGC; 'McMillan, Joseph M. (Perkins Coie)'; Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John, Mr, DoD OGC; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC

Subject: RE: U.S. v. Hamdan - D025 Government Response to Defense Motion to Compel Production of Expert Witness

Signed By: [redacted]

Attachments: D-025 Govt Response - Hamdan.pdf; D025-Gov Response.doc

To all: Please see the Government response to D-025

v/r
LCDR Stone

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**Defense Motion** to Dismiss the Charges and Specifications for Unlawful Influence 27 March 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court and this Court's orders dated 20 December 2007 and 15 February 2008.

2. **Relief Sought:** Defendant Salim Ahmed Hamdan moves to dismiss the charges and specifications with prejudice. In the alternative, the Defense seeks to disqualify the Convening Authority and the Legal Advisor to the convening authority from further participation in this case.

3. **Overview:** The Military Commissions Act (MCA) prohibits the unlawful influence of trial or defense counsel. 10 U.S.C. § 949b (2006). The former Chief Prosecutor and his subordinates were subjected to unlawful influence by the Legal Advisor to the Convening Authority and by political appointees in positions of senior leadership in the military commission process. The Chief Defense Counsel and Deputy Chief Defense Counsel have also been subjected to unlawful influence by the Legal Advisor to the Convening Authority. In the alternative, if the Legal Advisor is permitted to direct the actions of the Chief Prosecutor, he has so closely aligned himself with the prosecutorial function that he cannot continue to provide the requisite impartial advice to the Convening Authority.

4. **Burden and Standard of Proof:** Under U.S. military law, the defense bears the initial burden of raising the issue of unlawful command influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). The defense meets this burden by showing facts, "which, if true,

constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings." *Id.* Once the issue of unlawful command influence has been raised, the burden shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *United States v Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002).

Importantly, "disposition of an issue of unlawful command influence falls short if it fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial." *Stoneman*, 57 M.J. at 42. Even in the absence of actual command influence, unlawful command influence may place an "intolerable strain on public perception of the military justice system." *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001). Dismissal may be an appropriate remedy to cure the appearance of unlawful influence. *See, e.g., United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). These same rules should apply to military commissions where Congress has afforded detainees greater protections against unlawful influence than those that are found in the Uniform Code of Military Justice (UCMJ).

5. Facts:

i. On April 15, 2004, the General Counsel for the Department of Defense promulgated Military Commission Instruction No. 6. (Appendix A.) Instruction No. 6 established reporting requirements for personnel involved in the military commission process. The Appointing Authority reported to the Secretary of Defense. The Legal Advisor to the Appointing Authority reported to the Appointing Authority. And the Chief Prosecutor Reported to the Legal Advisor to the Appointing Authority.

ii. Before Colonel Morris Davis was detailed to the position of Chief Prosecutor, he was interviewed by Department of Defense General Counsel William J. Haynes. During their conversation, Colonel Davis reminded Mr. Haynes that there had been acquittals at the Nuremberg tribunals. Mr. Haynes responded by saying, "acquittals, we can't hold these men for six years and have acquittals. We have to have convictions."

iii. On September 29, 2006, Colonel Davis attended a meeting of the Special Detainee Follow-Up Group. The meeting was held in Deputy Secretary of Defense Gordon England's office and was attended by Mr. England and Mr. Haynes. During the meeting, Mr. England raised the issue of charging so-called high value detainees: "We need to think about charging some of the high-value detainees because there could be strategic political value to charging some of these detainees before the election."

iv. The Special Detainee Follow-Up Group met three times every week. Stephen Cambone, then the Under-Secretary of Defense for Intelligence, also attended these meetings. Mr. Cambone repeatedly advocated for the Department of Justice to have a greater role in the military commission process. He stated that military attorneys did not have the sophistication to deal with the cases before the commissions and that, if they had skill, they would be in the private sector. Colonel Davis resisted involvement in the military commission process by the Department of Justice. Before Colonel Davis resigned, no civilian attorney from the Department of Justice had made an appearance in Mr. Hamdan's case.

v. While these meetings were taking place, Congress was drafting the MCA. During that process, Colonel Davis met with Senators Lindsey Graham and John McCain. They asked him what he needed to accomplish the mission of the Chief Prosecutor. Colonel Davis advised them that both the Chief Prosecutor and Chief Defense Counsel should be uniformed officers. And he told them that these positions must be insulated from influence outside of their office. He drafted the language found in 10 U.S.C. § 949b that prohibits interference with the Chief Prosecutor.

vi. On January 9, 2007, Mr. Haynes called Colonel Davis and asked him how quickly he could charge David Hicks. Colonel Davis replied that the Secretary of Defense had not yet promulgated the Rules for Military Commissions or the Regulation for Military Commissions and that he could not charge Mr. Hicks before the Secretary of Defense had issued the Manual for Military Commissions.

vii. Ten days later, the Pentagon announced the issuance of the Rules for Military Commissions and the Regulation for Military Commissions. That same day, Mr. Haynes called Colonel Davis. He told Colonel Davis that he now had the Manual for Military Commissions and again asked how quickly he could charge David Hicks. He also asked Colonel Davis to charge a few additional detainees along with Mr. Hicks.

viii. On February 2, 2007, Colonel Davis had charges sworn against David Hicks, Omar Khadr, and Salim Hamdan to the Convening Authority. He was unable to forward the charges to the Convening Authority because there was no Convening Authority until February 7, 2007, when Mrs. Susan Crawford was appointed to her current position.

ix. On March 26, 2007, David Hicks pleaded guilty to one charge of material support for terrorism. Colonel Davis was not informed of the pre-trial agreement until he arrived at Guantanamo Bay to attend the scheduled arraignment of Mr. Hicks. After Colonel

Davis spoke publicly about not being included on pretrial negotiations, the Convening Authority privately counseled Colonel Davis on publicly breaking ranks with the Office of the Convening Authority.

x. On July 1, 2007, General Thomas Hartmann became the Legal Advisor to the Convening Authority. He immediately began what Colonel Davis describes as "nanomangement" of the Office of the Chief Prosecutor. He wanted to know the status of every case being worked up within the Office of the Chief Prosecutor. He wanted to review the evidence against each detainee and even the three main points each attorney intended to make during closing arguments. He wanted to know who was making the decisions on each case. If he thought one counsel was not a strong advocate, he would ask to have another attorney assigned as lead counsel. He wanted Colonel Davis to charge cases that were "sexy" or cases that had "blood on them." He specifically liked the case against Mohammed Jawad, which involved the alleged throwing of a hand grenade at two U.S. servicemen and their interpreter.

xi. Colonel Davis had a policy against using evidence obtained through torture. General Hartmann took the position that prosecutors should not make the decision about whether evidence was reliable. He insisted that such decisions be left to military judges. Months later, during testimony before the Senate Judiciary Committee, General Hartmann reiterated his position that the military judge—not the prosecutor—would be the gatekeeper for such evidence. In response to a question from Senator Feinstein as to the admissibility of evidence obtained from waterboarding, General Hartmann twice declined to answer because "the discretion of a prosecutor is inappropriate to be dealt with in public." *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008)(statement of Brig. Gen. Thomas Hartmann)(Appendix B). When pressed, he responded "Ma'am, again, the issues that deal with that are fundamentally based on reliability and probativeness of evidence. And the question that will be before the judge when that comes up is whether the evidence is reliable and probative, and whether it's in the best interest of justice to introduce the evidence." *Id.* Similarly, when Senator Feinstein asked him, "So in other words, if you believe you can prove something from evidence derived from waterboarding, it will be used?," General Hartmann replied, "If the evidence is reliable and probative, and the judge concludes that it is in the best interest of justice to introduce that evidence, ma'am, those are the rules we will follow." *Id.*

xii. In September 2007, Colonel Davis delivered a formal complaint regarding the interference of General Hartmann in his office to the Convening Authority. When he called the Convening Authority a week later to inquire as to the status of his complaint, she informed him that General Hartmann did not work for her and that the complaint had been forwarded to General Hartmann's boss, Mr. William Haynes.

xiii. Colonel Davis' complaint resulted in a formal investigation chaired by Brigadier General Clyde J. Tate, JAGC, USA, which concluded that there had been no unlawful influence on the Chief Prosecutor by the Legal Advisor because the Legal Advisor was authorized by regulation to influence the Chief Prosecutor. Memorandum from

Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sept. 17, 2007 at 5(d)(Appendix C).

xiv. On October 3, 2007, Mr. England issued a memorandum establishing a chain of command for the Office of Chief Prosecutor. Memorandum for Legal Advisor to the Convening Authority for Military Commissions dated Oct. 3, 2007 (Appendix D). Colonel Davis reported to the Legal Advisor to the Convening Authority. The Legal Advisor reported to the Deputy General Counsel who in turn reported to Mr. Haynes. Colonel Davis resigned the next day.

xv. Charges against Mohammed Jawad were sworn five days later on October 9, 2007.

xvi. On February 15, 2008, the Prosecution moved to admit into evidence a video-taped affidavit and film created by self-made terrorism expert Evan Kohlmann. The seven-part "documentary" chronicles the "history and development of the al Qaeda terrorist network and its declared war against the United States." Prosecution Motion to Pre-Admit the Documentary Motion Picture *the Al Qaeda Plan* dated Feb. 15, 2008 at 1.

xvii. On March 3, 2008, the Convening Authority denied a Defense request for an expert psychiatrist to testify in support of two motions at the next session of this Court. Letter from Convening Authority to LCDR Mizer dated March 3, 2008 (Appendix E).

xviii. On March 12, 2008, the Convening Authority denied a Defense request for an expert on al Qaeda to assist the Defense in its preparations for trial and to testify at trial. In its request, the Defense specifically outlined the need for expert assistance in preparing its opposition to the Prosecution motion to pre-admit the *Al Qaeda Plan.* Letter from Convening Authority to LCDR Mizer dated March 12, 2008 (Appendix F).

xix. Although the Prosecution has had the benefit of Mr. Kohlmann's assistance in preparing his video-taped testimony and "documentary," the Convening Authority has not approved any Defense request for expert assistance in refuting Mr. Kohlmann's testimony or for preparing Mr. Hamdan's defense.

6. <u>Law and Argument</u>:

I. THE UNIFORM CODE OF MILITARY JUSTICE REFLECTS AN ATTEMPT BY CONGRESS TO LIMIT THE INFLUENCE OF CONVENING AUTHORITIES OVER PARTICIPANTS OF COURTS-MARTIAL

The central focus of the framers of the Uniform Code of Military Justice was the elimination of "any influence of command control from a court-martial." *United States v. Goodwin*, 5 U.S.C.M.A. 647, 659 (C.M.A. 1955) (Quinn, C.J., dissenting). At the hearings before the House Armed Services Committee, the American Bar Association complained, "the

instances in which commanding officers influenced courts is legion." *Bills to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before the Subcommittee of the Committee on Armed Services United States Senate*, 81st Cong. 717-18 (1949). And, when interviewed by the Vanderbilt Committee, sixteen of forty-nine general officers "affirmatively and proudly testified that they influenced their courts." *Id.* Through the enactment of Article 37, UCMJ, Congress sought to put an end to this practice. *Id.* at 1019.

But before the House Armed Services Committee approved Article 37, Mr. Robert W. Smart, a professional staff member, noted: "[R]egardless of what you write into law...any smart CO can get through this section here or through this article 50 different ways if he really wants to influence a court...all [Congress] can do is to express its opposition in good plain words, as here, to such practices." *Id.* at 1021.

The framers of the Code were particularly concerned about so called "skin letters." *Id.* at 46. Skin letters were commonly used by convening authorities to reprimand the participants of courts-martial for actions that the convening authority disapproved of. *Id.* at 164-65. Professor Morgan, the principal architect of the Uniform Code of Military Justice, described the intent of the framers to eliminate command influence from courts-martial:

> On the question of command control, we have thought it was well enough to leave with the convening authority at present the appointment of the court and the officers as long as you have this kind of a review, *as long as you have lawyers in control of the trial, and a prohibition against any attempt to influence them unduly*.

Id. at 164-65. (emphasis added). But the power to appoint key members of the court did not remain with the convening authority for long. Congress stripped the convening authority of the

power to appoint military judges in the Military Justice Act of 1968. 10 U.S.C. § 826 (Oct. 24, 1968). The convening authority lost the authority to detail trial and defense counsel in the Military Justice Act of 1983. 10 U.S.C. § 827 (Dec. 6, 1983).

The detailing of trial and defense counsel is now left to service regulations. *Id.* In both the Navy and Air Force, trial and defense counsel are detailed by the Commander Naval Legal Service Command and Chief of Government Trial and Appellate Counsel Division respectively. COMNAVLEGSVCCOMINST 5450.1E, Mission and Functions of Naval Legal Service Offices and Trial Service Offices (June 18, 1997); Air Force Manual 51-204, United States Air Force Judiciary (Jan. 18, 2008). Army regulations delegate the authority to detail trial counsel to the command staff judge advocate. Army Regulation 27-10, Military Justice (Nov. 16, 2005). Army defense counsel are detailed through the Army Trial Defense Service. *Id.*

II. UNDER THE UNIFORM CODE OF MILITARY JUSTICE, A LEGAL ADVISOR TO A CONVENING AUTHORITY IS NOT A PROSECUTOR. HE MUST REMAIN NEUTRAL IF HE IS TO PROVIDE IMPARTIAL ADVICE ON THE STATUTORY FUNCTIONS OF THE CONVENING AUTHORITY

Although today's convening authority has less control over the participants at courts-martial than she did in 1947, she still controls critical aspects of courts-martial. She alone possesses prosecutorial discretion and determines if charges will be brought against an accused and in which forum. 10 U.S.C. §§ 822, 823, 830 (2006). She appoints the members who will decide the question of guilt or innocence and determine an appropriate sentence if an accused is convicted. 10 U.S.C. § 825 (2006). And, if an accused is convicted, she has the authority to approve, reduce, or set aside the findings and sentence of a court-martial. 10 U.S.C. § 860 (2006).

The Court of Appeals for the Armed forces has emphasized the importance of ensuring that the convening authorities and legal advisors who carry out these important statutory

responsibilities "be, and appear to be, objective." *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004) (*citing United States v. Dresen*, 47 M.J. 122, 124 (C.A.A.F. 1997); *United States v. Coulter*, 3 U.S.C.M.A. 657, 660 (C.M.A. 1954) ("However honest his intentions, an inherent conflict arises between a reviewer's duty to dispassionately advise the convening authority on the appropriateness of the sentence, and the prosecutor's innate desire to press for a substantial sentence as an accolade for his efforts in securing the conviction.")). The Court has disqualified legal advisors from performing statutory duties when they have not remained "neutral" in fact or in appearance. *Taylor*, 60 M.J. at 194. "A Staff Judge Advocate is not a prosecutor and is usually in a position to give neutral advice." *United States v. Argo*, 46 M.J. 454, 459 (C.A.A.F. 1997) (*citing* 10 U.S.C. § 806(c) (2006)).

III. IN THE MILITARY COMMISSIONS ACT, CONGRESS BROADENED ARTICLE 37'S PROHIBITION AGAINST UNLAWFUL COMMAND INFLUENCE BY CREATING THE OFFICE OF CHIEF PROSECUTOR AND BY PROHIBITING INTERFERENCE WITH HIS PROFESSIONAL JUDGEMENT

The congressional prohibition against unlawful command influence found in the UCMJ was also codified in the MCA. But Congress did not simply transplant the prohibition against unlawful influence found in Article 37, UCMJ, into § 949b of the MCA. Article 37, UCMJ, prohibits persons subject to the Code from coercing or unlawfully influencing "the action of a court-martial or any other military tribunal or any member thereof…." 10 U.S.C. § 837 (2006). Section 949b of the MCA is broader in scope and prohibits *any person* from coercing or unlawfully influencing "the exercise of professional judgment by trial counsel or defense counsel." 10 U.S.C. § 949b (2006). Colonel Davis will testify that Senators John McCain and Lindsey Graham inserted these provisions into the MCA at his request to secure the independence of the Chief Prosecutor from interference external to his office. Senator Graham

later commented on Colonel Davis' service as Chief Prosecutor from the Senate floor: "There is no finer officer in the military than Colonel Davis. He is committed to render justice." 152 CONG. REC. S10394 (Sep. 28, 2006) (statement of Sen. Graham).

IV. THE SECRETARY OF DEFENSE CANNOT AUTHORIZE UNLAWFUL INFLUENCE OF THE CHIEF PROSECUTOR BY REGULATION

While Congress sought to create an independent Office of the Chief Prosecutor, and even recognized Colonel Davis by name from the floor of the Senate, it made no mention of the Legal Advisor to the Convening Authority. The Legal Advisor to the Convening Authority is solely a creation of the Secretary of Defense. R.M.C. 103(a)(15); Regulation for Trial by Military Commissions (Regulation) 8-6.

The secretarial creation of this position is particularly surprising given the fact that Congress appears to have deliberately omitted the position of legal advisor when it codified the MCA. As Steven Bradbury noted in his statement before the House Committee on Armed Services, the MCA "track[s] closely the procedures and structure of the UCMJ." *Hearing Before the House Armed Services Committee on the Military Commissions Act*, 109th Cong. 3 (2006) (statement of Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice). But while Article 6 of the UCMJ addresses the function and role of staff judge advocates and legal officers, the MCA does not contain a single reference to either position. While Congress could have inserted Article 6 into the MCA, as it did with many other provisions of the UCMJ, it elected not to do so. Instead, Congress created an office entirely foreign to military justice: Chief Prosecutor.

Congress' failure to insert the UCMJ positions of staff judge advocate or legal advisor into the MCA was not an accident. One of the central purposes of the UCMJ was to strike a "delicate balance between justice and command discipline…." *United States v. Littrice*, 3

U.S.C.M.A. 487, 492 (C.M.A. 1953); Chief Judge Andrew S. Effron, Evolving Military Justice 172, Naval Institute Press (2002). During the congressional hearings on the UCMJ, "a sharp conflict arose between those who believed the maintenance of military discipline within the armed forces required that commanding officers control the courts-martial proceedings and those who believed that unless control of the judicial machinery was taken away from commanders military justice would always be a mockery." *Littrice*, 3 U.S.C.M.A. at 491. In the UCMJ, "Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws." *Littrice*, 3 U.S.C.M.A. at 491;*United States v. Hardin*, 7 M.J. 399, 404 (C.M.A. 1979) (The authority given to the staff judge advocate and the convening authority in military justice was intended to "establish the proper relationship between the legitimate needs of the military and the rights of the individual soldier").

In drafting the MCA, Congress did not have to strike the "delicate balance" between justice and command discipline. It was left to focus solely on justice and compliance with the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Command discipline for the alleged members of the Taliban and Al Qaeda currently detained at Guantanamo was left to their commanders in the field. Mr. Hamdan is not in any chain of command within the U.S. military. Accordingly, all references to commanding officers were omitted, as were many of the powers retained for commanding officers under the UCMJ. While Congress retained a diminished convening authority in the MCA, it eliminated the legal officer entirely.

Despite the congressional declination to provide for a legal officer, the Secretary of Defense has attempted to reinsert the legal officer into the military commission process. Section 8-6 of the Regulation states that the Chief Prosecutor shall report to the Legal Advisor to the Convening Authority. The Defense does not suggest that the Secretary of Defense could not

have created a legal officer to advise the convening authority. But he cannot nullify the congressional intent to create an independent office of the chief prosecutor by subordinating the Chief Prosecutor to the Legal Advisor to the Convening Authority and ultimately to the Convening Authority herself. Nor can he circumvent the congressional prohibition against unlawfully influencing the Chief Prosecutor by cloaking such conduct in the purported legality of a regulation. The Tate Investigation concluded that General Hartmann did not unlawfully coerce or influence the Chief Prosecutor because regulation permitted him to coerce and influence the Chief Prosecutor. Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sept. 17, 2007 at 5(d) (Appendix C).

Nothing in the plain language of § 949b or in the legislative history of the MCA suggests that Congress intended to subordinate the independent role and function of the Chief Prosecutor to functionaries later to be created by the Secretary of Defense. The creation of a Chief Prosecutor was itself a radical departure from the Uniform Code of Military Justice. And the congressional command that "no person" shall coerce or, without authorization, influence the Chief Prosecutor could not be plainer. If the Secretary of Defense can simply authorize coercion or influence of the Chief Prosecutor by regulation, what remains of the congressional prohibition against unlawful influence?

The attempt by the Secretary of Defense to authorize coercion and influence on the Chief Prosecutor is void *ab initio.* In cases of conflict, Manual provisions must yield to the statute. *United States v. Swift*, 53 M.J. 439, 451 (C.A.A.F. 2000). Federal statutes prevail over provisions of the Manual unless the Manual provision provides the accused with greater rights than the statute. *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992). The C.A.A.F. has routinely disregarded Part IV of the Manual for Courts-Martial when it conflicts with the

statutory language of the UCMJ. *See e.g.*, *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000). In this case, the Secretary of Defense cannot disregard the congressional command that "no person" coerce or, without authorization, influence the Chief Prosecutor by simply authorizing the statutorily prohibited conduct.

V. EVEN IF THE SECRETARY OF DEFENSE WAS WITHIN HIS AUTHORITY TO SUBORDINATE THE CHIEF PROSECUTOR TO THE LEGAL ADVISOR TO THE CONVENING AUTHORITY, THE LEGAL OFFICER HAS EXCEEDED HIS AUTHORITY AND HAS BECOME THE *DE FACTO* CHIEF PROSECUTOR

As addressed fully above, military courts have required that legal advisors to convening authorities "be, and appear to be, objective." *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004). The Legal Advisor to the Convening Authority in this case provides advice to the convening authority on whether or not to grant clemency, on the selection of members, and on whether charges should be referred for trial at all. 10 U.S.C. §§ 948h; 948i; 950b (2006). "A fair and impartial court-martial is the most fundamental protection that an accused service member has from unfounded or unprovable charges." *United States v. Dowty*, 60 M.J. 163, 170 (C.A.A.F. 2004). A fair and impartial military commission is no less an equally fundamental protection for Mr. Hamdan. Like the selection of members for courts-martial, the selection of members for service on military commissions "is not the convening authority's solitary endeavor." *Id*. at 169. She must "necessarily rely on" her staff, including her legal advisor. *Id.*; *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999).

Military courts have consistently disqualified staff judge advocates and convening authorities from further participation in cases when their actions have called into question their impartiality. *United States v. Clisson*, 5 U.S.C.M.A. 277, 280 (C.M.A. 1954) ("[W]e do not doubt the personal integrity of trial counsel, but we cannot overlook the fact that his previous

antagonistic role prevents his exercising that degree of impartiality required by the Code."); *United States v. Coulter*, 3 U.S.C.M.A. 657, 659 (C.M.A. 1954) ("[H]uman behavior is such, that when a person, interested in the outcome of a trial, is called upon to pass on the results of that trial, his decision is necessarily different from that of a person who had no interest in the matter."); *United States v. Gordon*, 2 C.M.R. 161 (C.M.A. 1952); *United States v. Howard*, U.S.C.M.A. 187 (C.M.A. 1974); *United States v. Lacey*, 23 U.S.C.M.A. 334 (C.M.A. 1975).

Perhaps with these cases in mind, the Tate Investigation warned the Legal Advisor in this case to "avoid aligning himself with the prosecutorial function so that he can objectively and independently provide cogent legal advice to the Convening Authority on matters within her cognizance; otherwise, the Legal Advisor may disqualify himself from providing competent legal advice by having acted in essence as trial counsel." Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sep. 17, 2007 at 5(d) (Appendix C). General Hartmann appears to have disregarded this admonition.

At a press conference to announce the preferral of charges against six detainees alleged to have conspired to attack the United States on September 11, 2001, General Hartmann announced that he had received sworn charges against the six men on February 11, 2008. Transcript of Press Conference of General Hartmann of February 11, 2008 (Appendix G). In fact, his office had been internally circulating drafts of the charges two weeks earlier. Electronic Mail Message from Colonel Wendy Kelly dated Jan. 29, 2008 (Appendix H). Moments later, General Hartmann explained how he would review the charges that his office assisted in drafting: "I will evaluate the charges and all of the supporting evidence, along with the Chief Prosecutor's recommendation, and I will forward them with my independent recommendation to Mrs. Susan Crawford, the Convening Authority for the Military Commissions." Transcript of Press

Conference of General Hartmann of February 11, 2008 (Appendix G).

In a February 22, 2008, interview with National Public Radio's Madeleine Brand, General Hartmann denied that there was political interference in the commission process. *A Twist in the Case Against Bin Laden's Driver* (NPR Feb. 22, 2008) (Appendix I). He compared himself with Colonel Davis: "I've been in this job seven months, and as I said, Colonel Davis was able to bring three cases to trial in two years and in seven months—and in the last four months since Colonel Davis has been gone we have moved 10 cases." *Id.* He then explained the recent surge in prosecutorial activity: "It's from me insisting that we move the process." *Id.* In a letter published in the *Los Angeles Times*, General Hartmann stated that he "directed [Colonel Davis] to evaluate more carefully the evidence, the cases, the charging process, the materiality of the cases, the speed of charging, the training program and the overall case preparation in the prosecution office." Thomas W. Hartmann, Op-Ed., *There will be no secret trials*, L.A. TIMES, Dec. 19, 2007 (Appendix J).

General Hartmann made similar statements while testifying before the senate judiciary committee in December 2007. *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008)(statement of Brig. Gen. Thomas Hartmann) (Appendix B). "If there has been an effort to increase the speed of the trials, the effort to improve the performance, an effort to improve the execution in the trial process, it has been my effort, and no one has directed me in that regard." *Id.* In response to a question from Senator Sessions, General Hartmann elaborated on his role in driving additional prosecutions:

> Senator, the focus—my focus has been to move the process with intensity and with focus and with prepared counsel. And my concentration has been to ask the counsel and encourage the counsel to identify those cases which have the most material

> evidence, the most important evidence, the most significant evidence among the roughly 80-90 or so cases that they intend to try, to bring those forward rapidly, as rapidly as possible in light of their evaluation of the evidence. So I agree with exactly what you said, Senator, but you need—we needed to focus on the most material cases and bring those forward as rapidly as possible.

He testified that his focus "is on the 80 to 90 people we intend to try for war crimes trials with the military commissions process." *Id.* "The entire process is part of my concern, but my almost entire focus is on the trials and moving them, which was the beginning of your comment, Senator, that we have only tried one person. I want to change that record." *Id.*

If there was any doubt that General Hartmann was aligning himself too closely with the prosecutorial function when the Tate Investigation issued its findings on September 17, 2007, there can be none now. General Hartmann openly compares his achievements during his tenure as *Legal Advisor* with those of the former *Chief Prosecutor*, Colonel Davis. And he claims to have single handedly energized the prosecutorial effort. He has done all of this while serving in an office requiring objectivity and neutrality. As he noted when testifying before the Senate Judiciary Committee, an accused "will also have the right to have his findings, if he's found guilty, and his sentence reviewed by the convening authority, impartially, impartially." *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008) (statement of Brig. Gen. Thomas Hartmann) (Appendix B). But the man who will advise her, and who continues to advise her in this case on issues such as funding for expert witnesses and the selection of members, is no longer impartial.

VI. THE LEGAL ADVISOR TO THE CONVENING AUTHORITY HAS ALSO SOUGHT TO UNLAWFULLY INFLUENCE THE OFFICE OF CHIEF DEFENSE COUNSEL

On January 25, 2008, a member of the Convening Authority's staff, Colonel Wendy Kelly, inadvertently emailed a draft copy of the charges against Khaleed Sheikh Mohammed and

five other detainees to Mr. Michael Berrigan, the Deputy Chief Defense Counsel. Electronic Mail Message from Colonel Wendy Kelly dated Jan. 29, 2008 (Appendix G). The draft charges were being circulated within the Office of the Convening Authority. *Id.* Mr. Berrigan immediately notified Colonel Kelly of the inadvertent disclosure but, after seeking counsel from his state bar, refused to return the draft charges.

On February 1, 2008, the Legal Advisor to the Convening Authority wrote a memorandum to the Chief Defense Counsel, Colonel Steven David. Memorandum from B.G. Hartmann to Colonel David dated Feb. 1, 2008 (Appendix K). General Hartmann stated that he had contacted the professional responsibility offices for the Army, Navy, and Marine Corps and they had opined that the Mr. Berrigan must return the draft charges against Mr. Mohammed. He demanded the return of the draft charge sheet. *Id.* General Hartmann forwarded a copy of the letter to Colonel David's immediate supervisor, Mr. Paul S. Koffsky. At time Mr. Koffsky, who is the Deputy General Counsel for Personnel and Health Policy for the Department of Defense, reported to Mr. Haynes.

The MCA prohibits attempting to coerce or unlawfully influence the professional judgment of trial or defense counsel. 10 U.S.C. § 949b (2006). While the Secretary of Defense has attempted to circumvent the statutory prohibition against unlawful influence of trial counsel by regulation, he has not done so for defense counsel. When unlawful influence is directed against a defense counsel, it "affects adversely an accused's right to effective assistance of counsel." *Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

The charge sheet, which was being circulated within the Office of the Legal Advisor, indicates that the Legal Advisor and the Convening Authority are playing a much larger role in the military commission process than was envisioned by Congress or that they will publicly

admit. The attempt by the Legal Advisor to coerce the Chief Defense Counsel into returning the draft charges by raising allegations of ethical misconduct was prohibited by statute. 10 U.S.C. § 949b (2006). Such conduct places an intolerable strain on the public perception of the military commissions system. *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). The strain in this case is already readily apparent:

> Moreover, Hartmann has now made the media rounds dramatizing the trials, denouncing the defendants as terrorist murderers who are finally seeing a glimpse of justice. Now, they may well be terrorist murderers who deserve to be prosecuted and receive severe sentences—but it is highly inappropriate for Hartmann to be making such statements. As legal adviser to the convening authority, any decisions in the case will be referred to him. And he has now publicly prejudged the cases, disqualifying himself under applicable ethical rules from playing the role which has been delegated to him. Even more to the point, the fact that a person who serves as a sort of appellate authority would be involved in the media spectacles designed to demonstrate the importance of the case against the accused reflects very poorly on the entire process, and will undermine public confidence in any result that it produces.

Scott Horton, *The Great Guantanamo Puppet Theatre*, Harpers Magazine, Feb. 21, 2008 (Appendix L).

7. Request for Oral Argument: The Defense requests oral argument to allow for thorough consideration of the issues raised by this motion. RMC 905(h) provides: "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions."

8. Request for Witnesses: The Defense intends to call Colonel Morris Davis and Mr. Michael Berrigan.

9. Conference with Opposing Counsel: The Defense has conferred with the Prosecution, which opposes this motion.

10. Attachments:

A. Military Commission Instruction No. 6.

B. *The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and is an End in Sight?* 110th Cong. (Dec. 11, 2008)(statement of Brig. Gen. Thomas Hartmann).

C. Memorandum from Brigadier General Clyde J. Tate to the Hon. Jim Haynes dated Sep. 17, 2007 at 5(d).

D. Memorandum for Legal Advisor to the Convening Authority for Military Commissions dated Oct. 3, 2007.

E. Letter from Convening Authority to LCDR Mizer dated March 3, 2008.

F. Letter from Convening Authority to LCDR Mizer dated March 12, 2008.

G. Transcript of Press Conference of General Hartmann of February 11, 2008.

H. Electronic Mail Message from Colonel Wendy Kelly dated Jan. 29, 2008.

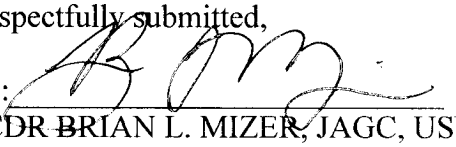
I. *A Twist in the Case Against Bin Laden's Driver* (NPR Feb. 22, 2008).

J. Thomas W. Hartmann, Op-Ed., *There will be no secret trials*, L.A. TIMES, Dec. 19, 2007.

K. Memorandum from B.G. Hartmann to Colonel David dated Feb. 1, 2008.

L. Scott Horton, *The Great Guantanamo Puppet Theatre*, Harpers Magazine, Feb. 21, 2008.

Respectfully submitted,

By: 
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Detailed Defense Counsel
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HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP
[redacted]

Attachment A

Department of Defense
Military Commission Instruction No. 6

April 15, 2004

SUBJECT: Reporting Relationships for Military Commission Personnel

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)

(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)

(c) Section 113(d) of Title 10 of the United States Code

(d) Section 140(b) of Title 10 of the United States Code

(e) Military Commission Instruction No. 1, current edition

(f) Department of Defense Directive 5105.70, "Appointing Authority for Military Commissions" (Feb. 10, 2004)

1. PURPOSE

This Instruction establishes supervisory and performance evaluation relationships for military commission personnel.

2. AUTHORITY

This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (b), (c), and (d). The provisions of reference (e) are applicable to this Instruction.

3. POLICIES AND PROCEDURES

A. The Office of Military Commissions (OMC) shall consist of the Office of the Chief Prosecutor (OCP) and the Office of the Chief Defense Counsel (OCDC), and those offices and functions as otherwise designated by the Secretary of Defense, General Counsel of the Department of Defense, and/or the Appointing Authority. The Secretary of Defense has established the Appointing Authority for Military Commissions as an element of the Office of the Secretary of Defense by reference (f) with specific responsibilities and functions. The Office of the Appointing Authority includes the Legal Advisor to the Appointing Authority and other appropriate legal and support personnel.

B. *Supervisory and Performance Evaluation Relationships.* Individuals appointed, assigned, detailed, designated or employed in a capacity related to the conduct of military commission proceedings conducted in accordance with references (a) and (b) shall be subject to the relationships set forth below. Unless stated otherwise, the person to whom an individual "reports," as set forth below, shall be deemed to be such individual's supervisor and shall, to the extent possible, fulfill all performance evaluation responsibilities normally associated with the function of direct supervisor in accordance with the subordinate's Military Service performance evaluation regulations.

1) Appointing Authority: Any Appointing Authority designated by the Secretary of Defense pursuant to reference (a) shall report to the Secretary of Defense in accordance with reference (c).

2) Legal Advisor to the Appointing Authority: The Legal Advisor to the Appointing Authority shall report to the Appointing Authority.

3) Chief Prosecutor: The Chief Prosecutor shall report to the Legal Advisor to the Appointing Authority and then to the Appointing Authority.

4) Deputy Chief Prosecutor: The Deputy Chief Prosecutor shall report to the Chief Prosecutor and then to the Legal Advisor to the Appointing Authority.

5) Prosecutors and Assistant Prosecutors: Prosecutors and Assistant Prosecutors shall report to the Deputy Chief Prosecutor and then to the Chief Prosecutor.

6) Chief Defense Counsel: The Chief Defense Counsel shall report to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense and then to the General Counsel of the Department of Defense.

7) Deputy Chief Defense Counsel: The Deputy Chief Defense Counsel shall report to the Chief Defense Counsel and then to the Deputy General Counsel (Personnel and Health Policy) of the Department of Defense.

8) Detailed Defense Counsel: Detailed Defense Counsel shall report to the Deputy Chief Defense Counsel and then to the Chief Defense Counsel.

9) Review Panel Members: Members of the Review Panel shall report to the Secretary of Defense.

10) Commission Members: Commission members shall continue to report to their parent commands. The consideration or evaluation of the performance of duty as a member of a military commission is prohibited in preparing effectiveness, fitness, or evaluation reports of a commission member.

11) Other Personnel: All other military commission personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks detailed or employed by the Appointing Authority pursuant to Section 4(D) of reference (a), if not assigned to the Office of the Chief Prosecutor or the Office of the Chief Defense Counsel, shall report to the Appointing Authority or his designee.

C. *Responsibilities of Supervisory/Reporting Officials.* Officials designated in this Instruction as supervisory/reporting officials shall:

1) Supervise subordinates in the performance of their duties.

2) Prepare fitness or performance evaluation reports and, as appropriate, process awards and citations for subordinates. To the extent practicable, a reporting official shall comply with the rated subordinate's Military Service regulations regarding the preparation of fitness or performance evaluation reports and in executing related duties.

4. EFFECTIVE DATE

This Instruction is effective immediately.

William J. Haynes II
General Counsel of the Department of Defense

Attachment B

80 of 104 DOCUMENTS

Federal News Service

December 11, 2007 Tuesday

SECTION: PRESS CONFERENCE OR SPEECH

LENGTH: 14585 words

HEADLINE: PANEL I OF A HEARING OF THE TERRORISM, TECHNOLOGY AND HOMELAND SECURITY SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE;
SUBJECT: THE LEGAL RIGHTS OF GUANTANAMO DETAINEES: WHAT ARE THEY, SHOULD THEY BE CHANGED, AND IS AN END IN SIGHT?;
CHAIRED BY: SENATOR DIANNE FEINSTEIN (D-CA);
WITNESSES: BRIGADIER GENERAL THOMAS HARTMANN, LEGAL ADVISER TO THE CONVENING AUTHORITY FOR MILITARY COMMISSIONS; STEVEN ENGEL, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE;
LOCATION: 226 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C.

BODY:

PANEL I OF A HEARING OF THE TERRORISM, TECHNOLOGY AND HOMELAND SECURITY SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE SUBJECT: THE LEGAL RIGHTS OF GUANTANAMO DETAINEES: WHAT ARE THEY, SHOULD THEY BE CHANGED, AND IS AN END IN SIGHT? CHAIRED BY: SENATOR DIANNE FEINSTEIN (D-CA) WITNESSES: BRIGADIER GENERAL THOMAS HARTMANN, LEGAL ADVISER TO THE CONVENING AUTHORITY FOR MILITARY COMMISSIONS; STEVEN ENGEL, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE LOCATION: 226 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C. TIME: 10:02 A.M. EST DATE: TUESDAY, DECEMBER 11, 2007

SEN. FEINSTEIN: (Strikes gavel.) That's the magic key, it appears. The meeting will come to order.

I know there are people in this room that have very strong feelings on a number of different subjects. I would request that you be respectful, that signs not block anyone's view, and that there be no comments made. I'd -- we would appreciate that. This is a serious hearing, and we're dealing with a very serious subject, and so we would appreciate everybody's cooperation. You're welcome to attend. We're delighted that you care. But please, be respectful.

And I'll begin with a brief statement, call on my ranking member, and then we will proceed.

Thirteen hundred miles south of Washington, in Guantanamo Bay, Cuba, the United States has built a detention facility to hold and interrogate suspected terrorists and other enemy combatants. Detainees began being brought to Guantanamo in January of 2002. Seven hundred and fifty-nine detainees have been held there. About 454 have been released or have died, four from apparent suicides. As of last week, 305 detainees remain. Of those, we understand approximately 60 to 80 have been cleared for release but are still being held because of difficulty sending them elsewhere. Only four detainees have been formally charged, and it is reported that the Defense Department plans to prosecute another 60 to 80 detainees.

The administration has repeatedly called those individuals at Guantanamo the worst of the worst, and there are bad people there.

However, today -- one of today's witnesses, Professor Denbeaux, has issued reports that challenge this assertion. This facility was established following a December, 2001, Office of Legal Counsel memo co-written by John Yoo that examined whether Guantanamo might be turned into a legal hybrid wholly under United States control but beyond the reach of the United States courts. The administration lawyer's theory was that since Guantanamo is not part of the territorial United States, the normal legal strictures could be avoided. However, once turned into a reality, this new facility has come under criticism, been the subject of many court challenges, and has harmed our nation's standing abroad.

For a period of more than 30 months, the Bush administration continued to hold these detainees at Guantanamo without providing them with any additional judicial or administrative review of their detentions. In June 2004, in Rasul v. Bush, the Supreme Court ruled that the reach of the United -- of the U.S. courts did extend to Guantanamo and the prisoners held there.

After that ruling, the executive branch granted the detainees some administrative review, although this process, too, has been criticized. All detainees were given a Combatant Status Review Tribunal, or a CSRT hearing. This was a one-time hearing to evaluate whether they were properly classified as an enemy combatant. Detainees were also given an annual review before an administrative review board, but this did not examine if their detention was lawful. Instead, the validity of each detention was assumed, and the review process only allowed each detainee to argue that he no longer constitutes a threat.

For the remaining limited number of detainees, they were to be tried by military commissions. However, the procedures initially put in place for those commissions by the administration were eventually struck down as inadequate by the Supreme Court in the Hamdan decision. The court ruled that the trials at Guantanamo had to be based on statute.

This led the Congress to pass, last fall, the Military Commissions Act. I voted against this legislation, because it allowed hearsay evidence, created a separate and lesser system of justice, and also eliminated the right of habeas corpus for all of Guantanamo's detainees. The 60 to 80 detainees that the department intends to try will be put through the military commission process, although when those hearings will take place is unknown.

Now, it is six years after the first detainees were brought to Guantanamo, and the administration still has not yet tried a single detainee, not in any U.S. criminal court and not by the military commissions. And only one detainee, David Hicks, has pled guilty. In addition, new concerns have been raised about the legal rights given to Guantanamo detainees, not just by outside scholars but by the very military officers who personally participated in the process. In fact, over the last few months, several military officers have publicly raised concerns about the procedures now in place.

First, Lieutenant Colonel Stephen Abraham, who served on the review board in the CSRT process, has said the DOD pressured him, and others on the CSRT review boards, to rehear a case and explain, quote, "what went wrong," end quote, when the CSRT issued a decision that one of the detainees should not be classified as an enemy combatant. Lieutenant Colonel Abraham also complained about the evidence being presented to the CRTs in order to determine detainee status. He said it was often generic, outdated, incomplete, and that no controls were in place to ensure that evidence of innocence was being disclosed.

And second, the Defense Department's chief prosecutor, Colonel Morris Davis, has recently resigned over his concerns about how the military commissions process has been politicized. Colonel Davis was previously one of the staunchest defenders of Guantanamo. Colonel Davis has written an op-ed in The New York Times and an article for the Yale Law Journal, this year, arguing that he and his prosecutorial staff at DOD could prove the critics wrong by holding full and fair trials at Guantanamo that would live up to the standards of American and international justice.

But on October 4th of this year, Colonel Davis resigned from his position after concluding that full, fair and open

trials were unlikely at Guantanamo.

Colonel Davis has stated to me, yesterday, that the convening authority, which is supposed to be independent and perform certain evaluations, has been compromised and politicized. Colonel Davis has stated to DOD and publicly that the prosecution process has been politicized, that the convening authority and its legal advisor would direct the prosecution's pretrial preparation, including directing the office about what evidence to use, what charges to file, and that his efforts to ensure that the military commissions would be open and fair were being overridden by administration officials who believed it was more important to get convictions before the 2008 elections.

As Colonel Davis told The Washington Post on October 20th, there was a big concern that -- this is a quote -- "there was a big concern that the election of 2008 is coming up. There was a rush to get high- interest cases into court at the expense of openness," end quote.

I invited Colonel Davis to testify at this hearing. However, the Defense Department has ordered him not to appear. That indeed is very disappointing. We assured the administration that Colonel Davis would not be asked about pending and open cases, but we were told simply that Colonel Davis was active duty military, and because he was active duty military, they could issue an order that he had to follow. I think this is a real shame that we will not have Colonel Davis as a witness today.

AUDIENCE MEMBER: (Off mike.)

SEN. FEINSTEIN: I think -- please. I think he has an important perspective. I wish the administration would allow him to appear.

Unfortunately, I have to conclude that by prohibiting Colonel Davis from testifying, the administration is trying to stop a fair and open discussion about the legal rights of detainees at Guantanamo. Clearly, the concerns that have been raised by Lieutenant Colonel Stephen Abraham and Colonel Morris Davis need to be discussed and evaluated.

I believe there also needs to be an examination of what is happening at Guantanamo, why cases are not being prosecuted, what needs to be done with detainees who can't be charged, and what legal rights should all detainees be afforded. That is the purpose of this hearing.

I look forward to hearing from the witnesses and am very pleased that my ranking member, somebody I've worked with on this committee now for about 12 years -- is that fair to say?

SEN. JON KYL (R-AZ): Yeah, 13 years.

SEN. FEINSTEIN: Thirteen years -- is here today. And I turn it over to you, Senator Kyl.

SEN. KYL: Thank you very much, Madame Chairman. And I appreciate your interest and the questions that you posed, and hope and trust that some light will be shed on them in today's hearing.

At least 30 detainees who have been released from the Guantanamo Bay detention facility have since returned to waging war against the United States and its allies. A dozen released detainees have been killed in battle by U.S. forces, while others have been recaptured. Two released detainees later became regional commanders for Taliban forces. One released Guantanamo detainee later attacked U.S. and allied soldiers in Afghanistan, killing three afghan soldiers. Another has killed an Afghan judge. One led a terrorist attack on a hotel in Pakistan and also led to a kidnapping raid that resulted in the death of a Chinese civilian. This former detainee recently told Pakistani journalists that he plans -- and I'm quoting now -- "to fight America and its allies until the very end."

The reality is that this nation needs to be able to detain those active members of al Qaeda and related groups whom it captures. Releasing committed terrorists has already resulted in the deaths of allied soldiers and innocent civilians and

may very well someday result in the deaths of U.S. servicemen. Such a result would be unacceptable, and the possibility of such a result must always be kept in mind when we consider the kinds of rights that should be extended to these detainees.

A detention regime for terrorists whom we intend to detain until the end of hostilities should seek to weed out mistakes, but it must also be designed in a way that also protects our nation's legitimate interests. Extending the civilian habeas litigation regime to unlawful war prisoners is problematic, among other things because detainees will demand access to classified evidence. In the civilian habeas system, a detainee would have a presumptive right of access to such evidence. The government could seek to redact portions of the evidence or summarize it, but in the end, it must provide the defendant with the substance of the evidence. If it can't do so, if revealing the substance of the evidence compromises a unique source, then the government simply can't use the evidence.

As difficult as the problems with classified evidence have occasionally proven in criminal trials, it would be greatly exacerbated in proceedings involving al Qaeda detainees.

Much of the information that we obtain about al Qaeda and its members comes from our most sensitive sources of intelligence. For example, much information has been provided to the U.S. by various Middle Eastern governments. These governments are often afraid of al Qaeda or radicalized elements of their own populations, and they don't want anybody to know that they're helping us fight al Qaeda. Often these governments provide information to the U.S. only on the condition that it not be disseminated outside of the U.S. intelligence community. If we suddenly were required in a detainee litigation proceeding to reveal to a detainee and his lawyer that we had obtained particular information from one of these governments, we would badly damage our relations with that government and could lose access to an invaluable source of intelligence about al Qaeda.

The same problems arise with certain technological sources of intelligence or with regard to particular human sources, and there is no simple solution through redaction or summarization of the evidence. Ofttimes the most important types of intelligence are sui generis, and revealing the nature of the evidence reveals its source. These types of problems would arise again and again in enemy combat litigation and would repeatedly present the United States with a Hobson's Choice: either damage a valuable intelligence source that could provide information about future al Qaeda attacks or release a committed al Qaeda member. This is not a choice that the United States should be forced to make.

Another question that immediately arises when contemplating the extension of litigation rights to al Qaeda detainees is, where does it end? The United States is holding 800 detainees at Bagram Air Base in Afghanistan and tens of thousands in Iraq. If the Guantanamo detainees can sue, why shouldn't these detainees be allowed to sue as well? After all, the U.S. military's absolute control over Guantanamo is really no greater than its control over any other U.S. military base anywhere in the world.

If this is a matter of principle, it should have applied in past wars. The U.S. detained over 2 million enemy war prisoners during World War II, including 400,000 who were held inside the United States. Should they have been allowed to sue in U.S. courts? Would there have been enough lawyers in the United States to handle the litigation? At the very least, we should be able to agree that we should not extend greater rights and privileges to combatants who violate the rules of -- the laws of war, including terrorists, than we do those who obey the laws of war.

The Guantanamo debate poses many difficult questions, questions that remain unresolved in light of the Supreme Court's most recent foray into the area. I look forward to testimony from today's witnesses, and hope that, as the chairman said -- chairwoman said, it can shed light on some of these important questions.

SEN. FEINSTEIN: Thank you very much, Senator Kyl.

Senator Cardin, it's my understanding you'd like to make an opening statement.

SEN. BEN CARDIN (D-MD): Thank you, Madame Chair. And I'm going to ask that my entire written statement be made part of the record.

SEN. FEINSTEIN: So ordered.

SEN. CARDIN: And just let me summarize very quickly.

The original purpose for why detainees were transferred to Guantanamo Bay from Afghanistan over five years ago was for us to be able to obtain intelligence information from the detainees that would be very important to protect the safety of the people of our nation.

That was its original purpose.

In doing this, we made major mistakes. The first was that we did not -- the administration would not allow those that were sent to Guantanamo Bay to challenge their status. Ultimately the courts intervened and that was changed. We never reached out to the international community to seek their understanding as to what we were trying to do in Guantanamo Bay. That was also a mistake.

And it's hard to understand that after five years, that the people at Guantanamo Bay that are being detained have significant intelligence value as far as what we can obtain through interrogation. They should be brought to justice. They should be brought to justice consistent with the values embedded in our criminal justice system that we're so proud about.

Madame Chair, I must tell you that I wear another hat, and that is the co-chair of the Helsinki Commission. And in that capacity I represent the Congress at international meetings. And there has been no issue -- no issue -- that's been brought up more in, I guess, disappointment in the United States in the manner in which Guantanamo Bay has been handled and the total disregard for the international community in that respect.

I want to thank you for conducting this hearing, because as the courts have said, the Congress has a responsibility to determine the framework in which the detainees at Guantanamo Bay are to be brought to our criminal justice system. And I thank you or holding this hearing and I hope that we will be able to get some answers. I am disappointed that we were not able to get the full cooperation of the administration on the witnesses before our committee. I think that's wrong. It's disappointing. And I look forward to working with you as we try to craft the proper response to the current situation that we find ourselves in.

Thank you.

SEN. FEINSTEIN: Thank you very much, Senator Cardin.

SEN. JEFF SESSIONS (R-AL): Madame Chairman?

SEN. FEINSTEIN: Yes. Senator Sessions?

SEN. SESSIONS: Just briefly. You know, when you say they should be brought to justice, if that means that captured prisoners of war have to be tried, then I don't agree. Prisoners of war are not tried; they are detained until hostilities end. We know that a number of those that have been improvidently released, as Senator Kyl has noted, has attacked us -- have attacked us again. These are people who are dedicated to the destruction of America. Many of them are.

I wish it were not so. I wish it were not so.

I wish that we could release these people. I wish we could not have to have detention of those who are waging war against the United States and our allies.

But we must do so, unfortunately, and we cannot create that -- transform military detention of prisoners of war, even unlawful combatants who don't comply with the war, into a trial. So, and I think it's appropriate that the military pick and choose what are the appropriate cases to try first. I don't see anything wrong with that.

Thank you, Madame Chairman. I look forward to the hearing.

SEN. FEINSTEIN: Thank you, Senator Sessions. We'll now turn to the panel, the two witnesses.

Brigadier General Thomas W. Hartmann has served since July of 2007 as the legal adviser to the convening authority of the Department of Defense Office of Military Commissions. He is responsible for providing legal advice to the convening authority regarding referral of charges, questions that arise during trial and other legal matters concerning military commissions. His duties also include supervising the convening authority legal staff.

Steven Engel, deputy assistant attorney general, Office of Legal Counsel, Department of Justice, is the second witness. Since February of 2007, Mr. Engel has served as a deputy assistant attorney general in the Office of Legal Counsel, where he has provided legal advice to the executive branch on a variety of matters, including the detention and prosecution of enemy combatants, treaties, and congressional oversight. Mr. Engel also serves as co-chair of the president's Task Force on Puerto Rico's Status.

Gentlemen, we welcome you and we'll begin with General Hartmann.

GEN. HARTMANN: Good morning, Senator Feinstein.

SEN. FEINSTEIN: General, before you proceed, I'm going to have seven-minute rounds. So if you could confine your testimony to that period of time, and we will do the same.

GEN. HARTMANN: Okay.

SEN. FEINSTEIN: Thank you.

GEN. HARTMANN: Thank you, Senator Feinstein, Senator Kyl, Senator Sessions, Senator Cardin. I'll ask that my testimony just be made part of the record. I won't read that into the record but I thought that it would be useful for the subcommittee to see the rights that are described in the testimony in reality.

And if you had been at Guantanamo Bay on the 5th and 6th of December, during the continuation of the United States versus Hamdan case, you would have seen the following when you walked into the courtroom on Guantanamo Bay.

You would have seen an accused who was in a tie and a coat, and he had headphones on his head as he was listening to a live translation and -- live translation of his testimony -- not his testimony but the testimony and the statements of the court during his continued trial. So he was hearing it in his native language.

Sitting next to him was a translator, between him and five counsel who were at his table. He had a detailed military defense counsel, detailed civilian defense counsel, two counsel from a distinguished law firm in the United States, and a counsel who is a professor at Emory University -- five counsel at his table.

Behind him was a U.N. observer, Mr. Scheinen (sp), as well as five members of the press and five nongovernmental organizations, the ACLU, the American Bar Association, Human Rights Watch, Human Rights First, among others.

The press were limited to five. In the courtroom there's an overflow building that we have for the press. So there were other press, domestic and international press, in that location as well.

In the Khadr hearing that had occurred approximately a month before that, there were 30 members of the press, and over the period of times that we've handled the commissions in the last several months, more than a hundred press people have attended these hearings.

Also present in the courtroom were military prosecutors -- a Navy officer, an Army officer -- and a member of the Department of Justice. Pivotal to that process was a uniformed officer, a military judge, who has more than -- approximately 30 years of service in the United States Navy. The judges come from all the uniformed services. This judge was from the Navy. He wore a black robe, and he presided over the hearing.

The accused was allowed to remain silent because that's his right. The accused and his counsel were allowed to cross-examine witnesses presented by the government because that is his right. The accused was allowed to call witnesses for the first time in this hearing because that is his right. He accused was allowed discovery, and the accused was allowed to seek witnesses who he said were exculpatory, even to the point that the convening authority at 10:00 on the night of the first hearing granted immunity to that witness, so that that exculpatory evidence, whatever it was, could be given. Those are the rights you would have seen in that courtroom.

If the accused is found guilty, he will have a right that no one else has in the United States or in any other court, and that is a right of automatic appeal to the Court of Military Commission Review. That is a right that is similar to the rights that we give to our uniformed soldiers, but no other civilian has that right.

He will also have the right to have his findings, if he's found guilty, and his sentence reviewed by convening authority, impartially, impartially. And she alone will be able to reduce the sentence or adjust the findings downward -- not upward, downward -- a right that doesn't exist anywhere on Earth except in the Uniform Code of Military Justice and in this system.

If you had arisen early in the morning that day, you would have seen a silhouette of a military member from the Air National Guard of Puerto Rico with a dog walking across the top of the building, protecting our soldiers, sailors, airmen and the members of that tribunal from bombs. There were approximately 60 members of the Puerto Rican National Guard defending and protecting that proceeding. And the place that I saw that silhouette from was what we call "Tent City" or Camp Justice, which is the location of the new Expeditionary Legal Conference. And that complex is being built by the Indiana Air National Guard and several other Air National Guard units from around the country. That complex is designed to be ready about March 1st to deal with classified information and other things, and your soldiers, sailors and airmen are doing a magnificent job in not simply describing the rights that are in the Manual for Military Commissions or in the Military Commission Act, but effectuating them and bringing them to reality for alleged war criminals.

Thank you, ma'am.

SEN. FEINSTEIN: You've concluded?

GEN. HARTMANN: Yes, ma'am.

SEN. FEINSTEIN: Thank you very much. Appreciate it.

Mr. Engel.

MR. ENGEL: Thank you, Chairwoman Feinstein, Ranking Member Kyl, Senator Sessions, Senator Cardin. I appreciate the opportunity to appear here today to discuss the legal rights of the enemy combatants detained at Guantanamo Bay.

General Hartmann outlined a series of the rights that the accused in the military commission is enjoying and will enjoy as those prosecutions go forward. I'd like to take this time with my remarks to talk about the legal rights with

respect to detention because these are issues that have been developed over the course of a number of years that represent the joint action of the executive branch, of Congress, with the guidance of the Supreme Court. And of course, that guidance we expect will continue with the Boumediene decision.

As the subcommittee is well aware, the United States is currently engaged in an armed conflict with little precedent in our history. Like past enemies, the attacks of September 11th demonstrated that al Qaeda and its allies possess both the intention and the ability to inflict catastrophic harm on this nation. These terrorist enemies, however, show no respect for the law of war. They do not wear uniforms, and they seek to achieve their goals through covert and brutal attacks on civilians, rather than by directly engaging our armed forces. Although the law of war is based fundamentally upon reciprocity, the unconventional nature of our enemies -- including their refusal to distinguish themselves from the civilian population -- has perhaps paradoxically resulted in our providing the Guantanamo detainees with an ever-increasing set of rights so as to assure ourselves that those detained at Guantanamo, in fact, pose a continuing threat.

And again, to be clear, this is a strength in our system. This reflects our commitment to the rule of law. But it is a strength that must be reconciled with the need to vigorously prosecute this armed conflict and to defend our nation against future attacks.

The subcommittee conducts this hearing less than one week after the Supreme Court heard oral argument in the Boumediene case. That case, again, will no doubt shed considerable light on the scope of the detainees' rights. In Boumediene, the D.C. Circuit upheld Congress' authority to restrict the availability of habeas corpus, as it had done under both the Detainee Treatment Act and the Military Commissions Act passed last year.

There is no doubt that the writ of habeas corpus represents a fundamental protection under our law, but the writ is fundamentally tailored for peacetime circumstances. The Constitution specifically grants Congress the authority to suspend the writ, even for American citizens, during times of rebellion or invasion.

In the nearly 800 years of the writ's existence, no English or American court has ever granted habeas relief to an alien prisoner of war.

Although the Detainee Treatment Act restricted the availability of habeas, it did not leave the detainees without a day in court. Rather, the act provides that the detainees, after receiving fair hearings before the Combat and Status Review Tribunal that the Department of Defense has set up, can further seek review of those decisions at the D.C. Circuit.

These CSRT procedures, as we call them, were themselves established to go beyond the requirements of the Geneva Conventions, the requirements owed to lawful prisoners of war, and as well as to provide the Guantanamo detainees with the due process that the Supreme Court in Hamdi versus Rumsfeld held appropriate for American citizens who choose for the enemy and are subsequently detained. The Detainee Treatment act, though, goes even further than those procedures and provides the D.C. Circuit with jurisdiction to review those CSRT decisions. This is a right of civilian judicial review that is virtually unprecedented during wartime.

The D.C. Circuit can consider all available constitutional and statutory arguments, and it can assure that the CSRT followed its own procedures, including a requirement that a preponderance of evidence supports the CSRT decision. The DTA review process would constitute an adequate and effective alternative to habeas corpus even if the detainees could claim such a right under our constitution. Still, the DTA procedures are more properly adapted than habeas corpus to the circumstances surrounding military detentions. As I noted, its extending habeas to Guantanamo would be unprecedented, and lacking precedence, it would raise a host of serious questions as to how habeas might apply.

For example, would we be required to bring the detainees into the United States to participate in habeas hearings? What rules of discovery would govern such proceedings? Could the detainees, for example, compel a United States soldier to return from Afghanistan or Iraq in order to appear and testify at such a hearing? And perhaps most seriously,

would a detainee have the right to review classified evidence such that the United States might be forced to choose between disclosing vital intelligence to the enemy or actually releasing members of al Qaeda?

The Department of Justice no doubt would argue for answers in any of these cases that would minimize their intrusion on our warfighting effort. But we can be equally assured that detainee's counsel would argue zealously on the other side. It is our hope that we will not need to answer these questions about how to apply habeas to a wartime situation, because the DTA procedures themselves provide a robust process that would be a constitutionally adequate alternative to habeas corpus, should the detainees be entitled to such rights.

In sum, the existing system reflects a careful and appropriate compromise between the needs of military operations and our commitment to the rights of the detainees. This system has been worked out between the political branches, fully consistent with existing judicial precedent and, we hope, will be upheld by the Supreme Court in its decision in Boumediene.

Thank you, Chairwoman Feinstein, Ranking Member Kyl and members of the subcommittee. And I look forward to answering your questions.

SEN. FEINSTEIN: Recognizing senators, it will be myself, Senator Kyl, Cardin, Sessions and Durbin.

Colonel Davis, General Hartmann, has also said that he directed his office not to use evidence obtained from or in connection with enhanced coercive interrogation techniques, specifically waterboarding. What is the current status of this issue?

GEN. HARTMANN: Ma'am, with regard to that, as a general matter, a prosecutor is not authorized and should not discuss matters of deliberation or how he's going to proceed with a trial in public. However, since Colonel Davis brought this matter to the public, the issue is very clear. As a matter of policy and as a matter of law, torture is prohibited under U.S. law. Statements obtained by torture are prohibited from being used in these commission proceedings.

As to other enhanced techniques and coercive techniques that might be used in connection with gathering evidence, that is the purpose for which the Military Commissions Act was created. That's why we have a judge in the courtroom. That's why the accused has the right to a defense counsel. That's why there are prosecutors, ma'am, and discovery. Those people will assess the facts and apply them to the law as it exists in the United States, and as it applies to the commissions. And that's the rule of law, not for me to make a decision about that in abstraction.

Trials, commission proceedings are 90 to 95 percent facts, and you apply the law to those facts. So to answer that in abstract is, number one, inappropriate. And anything dealing with the discretion of a prosecutor is inappropriate to be dealt with in public.

SEN. FEINSTEIN: So I understand, from the answer to your question, that evidence obtained from waterboarding is not being used to prepare cases.

GEN. HARTMANN: No, ma'am, I didn't say that.

SEN. FEINSTEIN: Well, would you repeat what you did say?

GEN. HARTMANN: Yes, ma'am, I will say that.

The evidence that we are gathering is the evidence that we are gathering. Whatever the methods that have been used to gather that evidence will be evaluated in connection with the law and in the trials. It can't be defined in an abstract way like that, ma'am.

SEN. FEINSTEIN: All right, so I understand it's a non-answer to my question.

Is evidence from other enhance/coercive interrogation techniques being used?

GEN. HARTMANN: Ma'am, I can't answer that either because these are ongoing trials and it's completely inappropriate for anyone associated with the preparation of cases or any kind of prosecution to prejudge those or to discuss those in the public. It's very critical that those involved in the prosecution effort have the ability to discuss those behind closed doors so that they can give unvarnished, unbiased, bark-off-the-tree opinions about the right answer.

SEN. FEINSTEIN: One last question on that subject. Do you agree that evidence obtained from waterboarding is unreliable and should not be used?

GEN. HARTMANN: Ma'am, again, the issues that deal with that are fundamentally based on reliability and probativeness of evidence. And the question that will be before the judge when that comes up is whether the evidence is reliable and probative, and whether it's in the best interest of justice to introduce the evidence.

That is the rule of law, ma'am. That is the rule of evidence. That is the rule of law and the rule of evidence that is supported by the Military Commission(s) Act that the legislature passed.

SEN. FEINSTEIN: So in other words, if you believe you can prove something from evidence derived from waterboarding, it will be used?

GEN. HARTMANN: If the evidence is reliable and probative, and the judge concludes that it is in the best interest of justice to introduce that evidence, ma'am, those are the rules we will follow.

SEN. FEINSTEIN: And how is that --

GEN. HARTMANN: That's the rules we must follow.

SEN. FEINSTEIN: -- how is that presented to the judge?

GEN. HARTMANN: How is --

SEN. FEINSTEIN: How is that issue presented to the judge in the course of a trial?

GEN. HARTMANN: Well, the -- I'm sorry -- the prosecution will raise the issue because the prosecution will be presenting the evidence or the defense will file a motion to exclude the evidence, and then the parties will deal with that motion and debate it.

SEN. FEINSTEIN: I see.

Did you, the convening authority, or anyone discuss the need to move quickly on cases because of upcoming elections?

GEN. HARTMANN: No, ma'am, I did not.

SEN. FEINSTEIN: That was never discussed?

GEN. HARTMANN: Absolutely not, ma'am.

SEN. FEINSTEIN: Would you agree that military commission trials should be open if possible?

GEN. HARTMANN: Yes, ma'am, absolutely. I fully support, and so does everyone in the commission process fully support, the value of having open trials and open presentations. We have moved mountains to try to get the press there, the nongovernmental organizations there, and we endeavor to do that. However, there will be circumstances in which classified evidence must be used to move forward on the cases, and in those limited sets of circumstances, it will

be necessary to close the trial to allow the evidence to come in.

Let me make one clarification which often gets in the newspaper which is inaccurate, and that refers to the word "secret" trials. There will be no secret trials. There is no mechanism for a secret trial. Every piece of evidence, every form of evidence, every type of evidence that will go before the jury will be seen by the accused and his counsel, subject to cross examination, subject to review. There will be no evidence that is used on a finding of guilt or innocence or a sentence that the accused does not have the right to see, object to and challenge.

SEN. FEINSTEIN: Thank you. I think that's helpful.

On April -- in April of 2004, DOD issued a press release saying that it was taking the general counsel out of the chain of command over the chief prosecutor to help ensure independence of the military commissions process. That was an important gesture because it took any political aspect out of the chain of command. This was done under Military Commission Instruction Number 6. Then on October 3rd, 2007, this position was reversed and new orders were issued putting the chief prosecutor under the legal advisor to the appointing authority, the deputy general counsel and the general counsel.

So in just a few months, you took out any opportunity for there to be civilian political influence, and then three months later, you put that back. Why was this change made?

GEN. HARTMANN: Ma'am, the fundamental principle of law in this country with regard to the military is civilian control over the military, so that's no surprise. And it is fundamental.

With regard to the change that you refer to as occurring on October 3rd or October 4th, the chief prosecutor always reported to the legal advisor. That's no change. The change was with regard to where I reported. I had no reporting official at that time, and one of the recommendations of the Tate (ph) investigative group was that that be clarified. And so the formal designation of my supervisor became the -- one of the deputy general counsel within the Office of the General Counsel.

That didn't change anything in reality, ma'am. And this is important. The person that was the deputy general counsel before that was the person who was also the deputy general counsel after that. I talked to that person regularly, every day. So did Colonel Davis. It was a very common form of association, a very common source of getting information and an understanding of the law and counsel. There was no change, ma'am, before October the 3rd or after October the 3rd, and there has been no political influence on this effort.

If there has been an effort to increase the speed of the trials, the effort to improve the performance, an effort to improve the execution in the trials process, it has been my effort, and no one has directed me in that regard.

SEN. FEINSTEIN: Thank you very much. My time is up.

Senator Kyl?

SEN. KYL: Thank you, Senator Feinstein.

First, General Hartmann, are you aware of any war crimes tribunal ever, in a U.N. tribunal, the Nuremberg tribunals or any other past or present U.S. or international war crimes tribunal, that has ever provided as much due process to alleged war criminals as has the current U.S. Military Commission Act trials?

GEN. HARTMANN: Senator, the rights that are provided under the Military Commissions Act and the Manual for Military Commissions are absolutely unprecedented in their generosity and benevolence to the accused.

SEN. KYL: Okay.

Mr. Engel, I understand that Professor Denbeaux, one of the witnesses on the second panel of today's hearing, will release a study today that discounts or downplays the evidence that some Guantanamo detainees whom we've released have again taken up arms against the United States. You might have heard me detail a whole series of cases in which that has occurred. What unclassified information can you provide about released detainees who have returned to waging war against the United States?

MR. ENGEL: Sure. Thank you, Senator. I haven't had a chance, obviously, to closely review the study of Professor Denbeaux, which I understand relies upon only the materials that have been publicly released and not the extent of classified information that the Department of Defense has.

I understand that in terms of publicly, the Department of Defense has said that upwards of 30 detainees who have been released from Guantanamo Bay have returned to various theaters in order to continue to wage jihad, often against American forces or our allies in Afghanistan or Pakistan.

Among these individuals I -- the individual department disclosed is a man named Mullah Shahzada, who assumed control of Taliban operations in southern Afghanistan after he was released. Another was Abdullah Massoud, became a militant leader in southern Waziristan. Taliban regional commander -- another individual who was reported by Al-Jazeera -- he appeared and asserted that he was the deputy Defense minister of the Taliban, and he discussed defensive positions of the mujaheddin and claimed that he had recently been involved in the downing of an airplane. They have -- you know, DOD has specifically discussed, you know, upwards of seven detainees, and they sort of asserted that there are 30 others that are out there.

And you know, this just shows that we have to be very careful with respect to the individuals detained at Guantanamo Bay. Contrary to popular myth, the ticket to Cuba is a not a one-way ticket. We have released over half the folks who have ever been there, and the United States continues, where possible, consistent with our national security, consistent with our obligations to ensure that detainees who are released will be humanely treated in the county to which they are returned -- we have continually been releasing detainees throughout the process. And you know -- and no process is perfect, and these folks are evidence that sometimes we make mistakes. And these mistakes can be costly.

SEN. KYL: Just in round numbers, the number of people who have been released, who were originally taken, held for a period and then released -- what is that number, approximately?

MR. ENGEL: Well, with respect to Guantanamo, I mean, the United States has detained upwards of 10,000 detainees in Iraq and Afghanistan over time. About 755 -- I believe the chairwoman quoted 759 -- have been brought to Guantanamo, and something like 455 or so have been released.

We currently have about 305 there.

SEN. KYL: Okay.

General Hartmann, back to the question I asked you originally. Let's go down some of the specific kinds of rights. Did the Nuremburg tribunals apply a presumption of innocence to the Nazi war criminals who were tried before those tribunals?

GEN. HARTMANN: So such presumption existed, Senator.

SEN. KYL: Did those tribunals limit the types of evidence, like hearsay evidence or evidence obtained in coercive circumstances, that it could consider when it found a particular piece of evidence probative and otherwise inclined to consider it?

GEN. HARTMANN: There were no rules of evidence, and virtually any evidence as freely admitted.

SEN. KYL: Did those tribunals allow any judicial review whatsoever of their verdicts?

GEN. HARTMANN: No, sir. And that was painfully apparent to those who were found guilty and received the death penalty. They were hung within hours and days of the completion of the sentence announcement.

SEN. KYL: Mr. Engel, let me ask you what effect did the initial Rasoul decision have on interrogation of al Qaeda detainees held at Guantanamo? This, of course, permitted a statutory habeas type of litigation.

MR. ENGEL: Sure. Well, I mean, I think -- we have often quoted a statement of Michael Rattner from the Center for Constitutional Rights, who is an attorney for the detainees, who boasted that interrogation and any kind of effective interrogation is impossible once the detainee has regular access to a lawyer. I think any expert on interrogation will tell you that once of the keys to a successful interrogation is a rapport between the interrogator and the subject. And any good attorney who is able to come in and represent a client is going to come in shut that down as soon as possible. So again, you know, the access to -- these access to attorneys -- which, of course, there is access to attorneys in many of the existing processes, but they do come at real cost to the effectiveness of our interrogations.

SEN. KYL: If habeas rights were extended to Guantanamo detainees, would they be allowed to subpoena U.S. soldiers and potentially recall them from the battlefield so that they could be cross examined by the detainee's lawyers?

MR. ENGEL: Well, I think that would be a very serious question. As I mentioned in my opening statements, extending the peacetime notions of habeas corpus to military prisoners is unprecedented, and there would be serious concerns that the detainee asserting a right to a compulsory process would be -- would be able to require soldiers to come back from the battlefield. We, of course, in the Department of Justice, would argue that that should not be required, but I'm sure there would be a vigorous debate over it.

SEN. KYL: That, of course, is one of the things Justice Jackson warned about in the decision -- at least up till now had been the primary U.S. decision in the matter.

Incidentally, I understand you clerked for Justice Kennedy. I'm tempted to ask you what you think he might do in Boumediene case, but I'll refrain from doing that. (Laughter.)

MR. ENGEL: I appreciate that.

SEN. KYL: I don't think that would be prudent.

Let me just ask one final question here. If litigation rights were extended to these detainees, and they were given right -- well, would they be given potentially access to classified materials? What kind of problems would that create, or would the request, by their lawyers to gain access to that classified evidence, create?

MR. ENGEL: I think that's a big question and a big issue.

And really, one of the biggest issues and the greatest difficulties that we have faced, with respect to detaining individuals, with respect to the CSRT process, the DTA review process, the potential for habeas and the military commissions process, is, how do we deal with the wealth of classified information that we have and we rely on and must protect in order to wage a war, and at the same time provide some kind of adversarial process at times in which the detainees have the opportunity to confront the evidence against them? And the CSRT process, with the DTA review, has developed to what we think is a workable and a fair system, one grounded in familiar law- of-war principles.

As to alternatives, as to something like traditional habeas, again we would argue vociferously for limits on detainees' access to classified information. But CIPA rules require alternatives, if you're not going to give individuals the actual evidence, and it's not always easy to come by those alternatives. So we would be very concerned over precisely that issue.

SEN. KYL: I want to thank both of you for being here today, and apologize in advance. I have a meeting at 11. I'm going to have to leave in about five minutes for that and I wish I could be here for the remainder of your comments.

Thank you, Madame Chair.

MR. ENGEL: Thank you, Senator.

SEN. FEINSTEIN: Kyl.

Senator Cardin.

SEN. CARDIN: Thank you, Madame Chair.

General Hartmann, let me first make it very clear about the service of our people down at Guantanamo Bay. I've been to Guantanamo Bay, and the men and women who are serving our nation there are serving with great distinction in protecting our country and in the methods that they are using in carrying out their responsibilities. And I have nothing but praise for the men and women who serve our nation.

My concern is that -- why we never sought the advice of the international community in the manner in which detainees were treated, and decided to go to Guantanamo Bay. This is unprecedented, the unlawful combatant circumstances, and yet we chose to do this on our own, without really working with the international community. But for the courts, there would have been no opportunity, for those who were determined to go to Guantanamo Bay, that any type of a transparent process to decide whether they were appropriate to be at Guantanamo Bay or not.

I want to just -- first, in regard to Senator Kyl's point, those who have been charged at Guantanamo Bay -- are any of them charged with war crimes?

GEN. HARTMANN: They are charged with war crimes as defined in the Military Commissions Act. They're charged --

SEN. CARDIN: But not in regards to international -- Nuremberg, those were created under the auspices of the international community. Is there any effort here to use the international community's definitions? My understanding is that David Hicks pled guilty to material support, that Muhammed Dawood (sp) is charged with attempted murder. Am I wrong in those assumptions?

GEN. HARTMANN: You are correct in those.

SEN. CARDIN: Thank you.

And Mr. Engel, your point about wartime powers of the president, the wartime powers generally that we have, my concern with that as it relates to habeas corpus -- and I disagree with your analysis on the habeas corpus burdens; I think that these individuals are basically criminals and that criminals have the right of habeas corpus. But under the president's definitions of wartime powers, we're going to be at war during all of our lifetime. The war against terror is unlikely to have a definitive end. I think that's just a dangerous interpretation of the powers, to say that we're going to deny those who are now entering our criminal justice system the ability at early stages -- at this point it's already very late -- to have basic rights. And I just disagree with you on that.

I want to get back, though, to Chairman Feinstein's point on how cases are prepared. General Hartmann, you raise a point in regards to how evidence will be determined. You point out, and rightly so, that evidence that is obtained by illegal means cannot be used in a trial, should be excluded. And you've acknowledged that torture is illegal under U.S. law.

My question to you is, what process, if any, do you have in the development of a case to take a look at the methods

that were being used to obtain evidence to make an independent judgment as a prosecutor as to whether that evidence has been obtained lawfully or not? Any competent state's attorney in preparing a case will take a look at the evidence to see whether it is permissible to be used or not. What process have you developed within the military commissions to evaluate the legality of the information that's been obtained?

GEN. HARTMANN: Senator, those are -- that's an important question and it's a question that every prosecutor must ask himself or herself. And it's a process through which they must go. I am not going to describe that process to you in public.

It's a process and it's a matter of judicial and prosecutorial discretion. They must have the privacy, they must have the behind- the-doors ability to evaluate the evidence and to look at it in an unvarnished way. But for me to tell you in public, on the record, the process that they use would be completely inappropriate.

SEN. CARDIN: Are you --

GEN. HARTMANN: But I assure you there is a process.

SEN. CARDIN: And are you telling us that that process will exclude certain information because of the concerns about it being challenged?

GEN. HARTMANN: No, sir, I'm not telling you that. I'm telling you that there is a process, and that the obligation of the prosecution is to take the evidence through that process and to try to determine if they think it will be admissible or not, and the reasons for which they think any particular piece of evidence will be admissible. And if they intend to proceed with that, that issue will then be resolved in public in front of a court -- in front of the judge, the defense counsel, the accused and the prosecutor.

SEN. CARDIN: Explain to me why the process that you use cannot be discussed in a public forum.

GEN. HARTMANN: Because there's no particular -- there's no defined step one/step two/step three process that anyone uses, Senator. There's a process that you use. You take the evidence that you've got, which is unique in every single case, and you evaluate that against the law and the rules of evidence. So to say that you follow a specific process, it would be completely inaccurate in the first place.

Any prosecutor -- even if you're not a prosecutor, if you're a trial lawyer, you understand that the focus of your attention has to be on the facts -- not on generalities, not on even the broad outlines of the rules, but the facts. And then you figure out how to admit that evidence with the challenges that you will face in trying to admit that evidence.

SEN. CARDIN: You've acknowledged, and properly so, that information obtained or facts -- information obtained through coercion will not be -- should not be used and is unreliable. So we had a hearing yesterday in College Park, on the Helsinki Commission, on torture, and it was interesting as to one subject that came up, and that is the reliability of information that's obtained through torture or similar procedures, and that during the times of witchcraft, we had confessions that people were witches. So the reliability of this information is very questionable, and I think we would all feel more comfortable if you would be more forthcoming in telling us the process -- not talking about a specific technique that may or may not have been used, but a process -- so that we have a little more confidence that our government is, in fact, evaluating, as they prepare for criminal trials, the quality of the information that they have obtained.

GEN. HARTMANN: Senator, the key to your answer will be found in the well of the courtroom. That's where --

SEN. CARDIN: I disagree with that. I think there's an obligation on the government in preparing a case to make sure it's done properly.

GEN. HARTMANN: It will be done properly, Senator. And that's where you -- you will learn about that in the well of the courtroom.

The prosecutor's obligation, his fundamental obligation is to ensure justice in the military commissions process and in the Uniform Code of Military Justice process. That is his fundamental obligation or her fundamental obligation. So it's their duty to take the evidence, to assess the evidence, to determine its admissibility, to determine the risks of non-admissibility, to determine the law that applies to the admissibility of that evidence.

And then they make a decision whether they're going to try to use it in the case. And once they try to use it in the case, in the American system the defense counsel, a right that this Congress gave to these accused, will challenge that evidence. And the military judge, who will be present and who has experience, will be able to challenge it and will be able to evaluate it.

And the press that we bring down to these hearings will be able to see that and report that to the world. And the nongovernmental organizations that we allow to sit in the courtroom will see that and bring that to the attention of the world.

You will be very proud, Senator, of what your uniformed service members are doing. They are following the rule of law. They are following the rule of law. I am not going to presume on them what that is. They know the law. They know the evidence. These rules of evidence are quite similar to the things that they follow in the military court-martial process, which is renowned by some of our greatest trial advocates as an outstanding system.

SEN. CARDIN: I --

GEN. HARTMANN: Those are the same people who take an oath to protect the Constitution.

SEN. CARDIN: And I don't --

GEN. HARTMANN: The same oath they are using in the (desert ?).

SEN. CARDIN: I don't challenge anything you've said about the dedication of the people who are doing their job. I just come back to a point that I expect those who prosecute in the criminal cases will also try to help us improve the system, that's helped -- that's been done at the local levels, at the federal levels. And I would feel more confident if I knew that there was some evaluation being done by those who are preparing the case as to the methods that were used to obtain information.

GEN. HARTMANN: It is being done, Senator.

SEN. FEINSTEIN: Thank you very much, Senator Cardin.

Senator Sessions is next. (Pause.) Senator? You're up.

SEN. SESSIONS: Thank you. Thank you, Madame Chairman, and I thank the panelists.

There was a concern -- I remember reading in the paper, I think, about the selection process of what cases to try first. As a former United States attorney and attorney general of Alabama, I think good prosecutors always try to pick the cases they feel in a series of cases that have the greatest appeal, maybe the strongest evidence.

And to me, that's just good prosecutorial strategy.

Apparently, Colonel Davis (sp) objected to that. Explain to me what that disagreement is all about, General Hartmann.

GEN. HARTMANN: Senator, the focus -- my focus has been to move the process with intensity and with focus and with prepared counsel. And my concentration has been to ask the counsel and encourage the counsel to identify those cases which have the most material evidence, the most important evidence, the most significant evidence among the roughly 80 to 90 or so cases that they intend to try, to bring those forward rapidly, as rapidly as possible in light of their evaluation of the evidence. So I agree with exactly what you said, Senator, but you need -- we needed to focus on the most material cases and bring those forward as rapidly as possible.

SEN. SESSIONS: Well, I think it's almost prosecutorial incompetence not to think in those terms. It's important that you do so.

Let me ask you this. We had this long list of people that have been released. I would suggest that if those who have been released had killed a United States senator instead of an American military person, we'd have a lot different attitude about it.

And my question to you, General Hartmann, is, why are these people being released? We have some of them, you say, Mr. Engel, that they were al Qaeda leaders and this sort of thing. What kind of process allows us to take a person who it appears are dedicated to their cause to the point that some will blow themselves up to kill men, women and children, why we would release these persons that could result in the death of American servicemen?

MR. ENGEL: Well, Senator, I think that's a very good question. I think what it shows is that no process is perfect. And these are individuals who were detained initially and managed to convince the United States over a period of weeks, months, you know, even in some cases maybe years, that they were innocent or they were minor bit players, and that all they were looking to do was to go back home and you know, be with their families and return to, you know, whatever, you know, agricultural or otherwise activity that they do.

And you know, they frankly -- they tricked us, I mean, you know, and any process in which we are releasing individuals is a process with risk. And you know, we understand this risk, you know. But it is a risk that we are committed to, because we're not looking simply to being an indefinite jailer of all the individuals at Guantanamo; we are trying to work hard to make sure that individuals who can be released without a threat to our national security in fact are released. And that's sort of -- and what these cases reflect, though, is that no release is going to be a risk-free proposition, even if we believe that these individuals are no longer a threat.

SEN. SESSIONS: Well, I just thought you captured somebody in the course of a military conflict, and they were detained, because any good soldier, while they are being detained, know their rights and that sort of thing. But when they get out of jail, they go back and join the forces that they used to be a part of. I mean, that's what every -- people who escaped from prison went back to their American units and fought against the enemy and continued to do so. So that's why you hold them until the war is over.

And frankly, I think this committee and this Congress needs to focus a little bit more on trying to protect our soldiers, protect our homeland, make sure that murderers, killers who are dedicated to the destruction of America are detained, rather than trying to see how many we can release. And I suspect some of those -- released because there was a feeling that Congress is on your necks and you had to demonstrate that you were going to release a lot of prisoners so you would get less criticism at a hearing like this. And now we've got people dead as a result of it.

General Hartmann, with regard to the trials that you've referred to, just -- if you can clarify for the American people and me, because I tend to get confused about it, are you trying people to ascertain -- these trials are to ascertain whether they should be continued to be held in custody? Are these trials to ascertain whether they deserve punishment for committing acts unlawfully under the rules of war?

GEN. HARTMANN: It's the latter, Senator. We are focusing these trials on violations of the law of war. And based upon a finding of "guilty," they would be sentenced to confinement.

The other people are detainees as Mr. Engel has described. These are people who are going to be tried under the Military Commission Act for violations of the law of war, and they will be sentenced upon a finding of "guilty."

SEN. SESSIONS: Well, I remember what happened at Oklahoma City after those people were tried for bombing American citizens.

They were -- at least one of them was executed. Is it possible some of these who've murdered innocent men, women and children and American personnel could be executed?

GEN. HARTMANN: It's an option that's available under the Military Commission Act. And again, Senator, I won't prejudge any case or any charging.

SEN. SESSIONS: Well, I would just hope that if that kind of punishment is good enough for an American who kills Americans, that it ought to be good enough for a terrorist who kills Americans.

Mr. Engel, is there any judicial decision in the 800-year history of Anglo-American jurisprudence in which habeas corpus relief has been extended to someone who's been declared a prisoner of war?

MR. ENGEL: I'm not aware of one.

SEN. SESSIONS: I'm not either.

MR. ENGEL: Indeed the Supreme Court in considering this last week -- I think it came clear in oral argument no one at that court was able to find one that was directly on point, as you've said, Senator.

SEN. SESSIONS: I think it has grave implications for our ability to be successful as a nation in the defense of this republic if we capture people on the battlefield and then start treating them as American citizens who are being tried for a drug crime. It just does not make sense to me.

Now, how do we get to the point that our prisoners of war are now being entitled to personal attorneys? This is a step that's unusual in the history of war, it seems to me. General, my time's up, so if you'll briefly respond to how we got to this point, and is this consistent with the history of the way we treat prisoners of war in the past?

Because as you noted, Mr. Engel, when an attorney talks with a client, the first thing they tell them is to quit talking.

MR. ENGEL: That's right. With respect to detention issues, the use of lawyers is virtually unprecedented in the annals of armed conflict. With respect to the prosecution, I think in order to have prosecutions, there have been, of course, defense lawyers in those cases. But we grant an unprecedented degree of process here, including review by Federal Court of Appeals in the D.C. Circuit.

GEN. HARTMANN: I can't add anything to that, Your Honor. But as I said, Mr. Hamdan had five defense counsel at the table last week.

SEN. SESSIONS: Well, it's a dangerous group of prisoners that you're dealing with. I visited in Alabama our German prisoner of war camp in Pickens County. People were given a great deal of freedom.

They still have many items that they have there. And it was a different kind of prisoner than we have today.

SEN. FEINSTEIN: Thank you, Senator Sessions.

Senator Durbin.

SEN. RICHARD DURBIN (D-IL): Thank you, Madame Chair.

Mr. Engel, many of us were troubled to learn that CIA officials destroyed videotapes of detainees being subject to the so-called "enhanced" interrogation techniques. These techniques reportedly included forms of torture like waterboarding. According to some media reports, the Justice Department attorneys advised the CIA not to destroy these videos. Was the Department of Justice aware of the existence of these tapes prior to their destruction?

MR. ENGEL: Well, let me say what I can say, because the Department of Justice, as you know, has initiated a preliminary inquiry, which is being run by Ken Wainstein of the National Security Division in conjunction with the CIA's inspector general's office. And I also know that General Hayden is going to be testifying this afternoon.

I am not aware of my office being involved in providing legal advice on the subject, but you know, I've seen the press reports which suggest that some of these issues may have been discussed years ago. You know, and I think Mr. Wainstein's investigation, or the preliminary inquiry, will bring a lot of these facts to light.

SEN. DURBIN: Specific question: was the Department of Justice aware of the existence of these tapes before they were destroyed?

MR. ENGEL: Sitting here, I don't have an answer for that, Senator.

SEN. DURBIN: Did the Department of Justice advise the CIA not to destroy these tapes?

MR. ENGEL: Again, likewise. I've seen what's in the press reports, but sitting here, I don't have an answer, though --

SEN. DURBIN: When General Hayden said the destruction was in line with the law, do you have any indication or knowledge of the law as it was given to him or the standards that he was asked to follow in destroying these tapes?

MR. ENGEL: Again, sitting here, I am not aware.

SEN. DURBIN: General Hartmann, you said that the military commissions are transparent, provide a window through which the world can view military justice in action. You also claimed military commission defendants have the right to review and respond to all evidence. In the pending case of Omar Khadr, defense lawyers have been ordered not to tell the defendant or anyone else who the witnesses are against him. How can you call a system that relies on secret evidence transparent?

GEN. HARTMANN: We don't rely on secret evidence, Senator. Every piece of evidence that will go to the finder of fact, to the jury, will be reviewed by the accused or his counsel.

SEN. DURBIN: You are a graduate of law school and you know that confronting your accuser is part of our system of justice. In this situation, Mr. Khadr is not even given the identity of the witnesses who are testifying against him.

GEN. HARTMANN: There may be some limited cases in which that applies, Senator. However, in that -- the order to which you are referring says below it "except as provided below." In that order, it specifically said at 21 days before trial, the prosecution has the burden of explaining why that part of the order that you're focused on is to continue.

And if the prosecution does not do that, then all the witnesses are made available to the counsel and to the accused.

SEN. DURBIN: Well, the presumption is just the opposite, as I understand it. The presumption is that the prosecution -- the government -- can withhold the identity of the witness.

GEN. HARTMANN: No, I would say the presumption is just the opposite; that unless the prosecution makes an

affirmative effort, these witnesses will be disclosed to the accused.

SEN. DURBIN: And has that happened?

GEN. HARTMANN: We haven't gotten to 21 days before trial, sir.

SEN. DURBIN: I see.

Well, let me ask you this. In the six years that Guantanamo has been in operation for this purpose, how many convictions have taken place of the 775 people who've been detained there?

GEN. HARTMANN: One.

SEN. DURBIN: Would you repeat that for the record?

GEN. HARTMANN: One.

SEN. DURBIN: And was that not a plea bargain?

GEN. HARTMANN: It was a pretrial agreement, yes, sir.

SEN. DURBIN: And it involved a sentence of what duration?

GEN. HARTMANN: I believe it was a sentence of seven years, with everything above nine months deferred.

SEN. DURBIN: So it ended up nine months detention; correct?

GEN. HARTMANN: That may be the case, sir.

SEN. DURBIN: And this gentleman, Mr. Hicks, I believe, was a low-level operative?

GEN. HARTMANN: I don't -- I wouldn't categorize it, sir.

SEN. DURBIN: Isn't it interesting that in six years, with 775 detainees who have been characterized here as war criminals, bloodthirsty killers, that only one conviction has taken place? How do you explain that?

GEN. HARTMANN: I cannot explain it. There are reasons with regard to various legal delays. However, I am as disappointed in that as you are, and I am, with the various members of the Office of Military Commission, trying to move the process much more rapidly, Senator.

SEN. DURBIN: Somewhere in your heart of hearts, in those dark moments at night when you reflect on what you do, have you thought perhaps we're doing this the wrong way; maybe we don't have the people who are most threatening to the United States? Isn't the fact that we've released 470 of these detainees an indication that maybe we got it wrong in over half the cases in bringing them to Guantanamo?

GEN. HARTMANN: In my heart of hearts, Senator, I'm convinced we've got the right process with the military commissions. It is literally unprecedented the rights that we are making available to people we call alleged terrorists. Unprecedented.

SEN. DURBIN: Well, let me talk to you about some of those rights. Four hundred seventy of these people were arrested, transported, detained and interrogated for months and years and then released because we couldn't charge them with one single crime or one thing that they'd done wrong. Is that not correct?

GEN. HARTMANN: I don't know, Your -- I don't know, Senator. My focus is on the 80 to 90 people we intend to

try for war crimes trials with the military commissions process.

SEN. DURBIN: Well, that's a good focus. But I still wonder what happened to 470 people who took a little tour through Guantanamo for years and now go home to explain to the rest of the world what American justice is all about. Isn't that part of your concern as well?

GEN. HARTMANN: The entire process is part of my concern, but my almost entire focus is on the trials and moving them, which was the beginning of your comment, Senator, that we have only tried one person. I want to change that record.

SEN. DURBIN: So Senator Kyl talked about having to call in American soldiers as witnesses here, take them off the battleground, he said. But just how many of the people, those 775 that have been detained at Guantanamo, were in fact picked up off the battlefield?

GEN. HARTMANN: Your Honor -- Senator, that's outside of my area. That's in the --

SEN. DURBIN: Well, I'll tell you what Professor Denbeaux tells us. He tells us, according to his report, when President Bush says these people at Guantanamo have been picked up off the battlefield, the Defense Department has accused only 21 detainees of having ever been on the battlefield -- 21 out of 775. He'll testify as well the Department of Defense has alleged that only one -- only one detained in Guantanamo -- was captured on a battlefield. Do you have any evidence otherwise?

GEN. HARTMANN: I don't.

MR. ENGEL: I mean, Senator, I think it's important for the United States to be able to detain members of al Qaeda, members of the Taliban, whether we get them on a literal battlefield outside of Tora Bora or whether we get them in a city, you know, thereafter -

SEN. DURBIN: I don't argue with that premise. I think your premise is correct.

But this notion that somehow we're going to devastate our military by calling our soldiers off the battlefield to show up at these commissions to testify on behalf of the government is frankly not supported by the clear evidence here that these are not battlefield combatants that are under arrest.

MR. ENGEL: Well, again -- and you know, and I would defer to General Hartmann -- I mean, if we look only at the hearing last week in the Khadr case, we did have military officers appearing and testifying about the circumstance under which Mr. Khadr was apprehended --

SEN. DURBIN: Is there anything wrong with that?

MR. ENGEL: And there's nothing wrong with that, and the military commissions --

SEN. DURBIN: Isn't that part of a system of justice?

MR. ENGEL: Well, but we're talking here about two different things. We're talking about a military commissions process, and when we prosecute people, we do believe, if feasible, that we should be able to get the witnesses into the court, which will not always be feasible.

SEN. DURBIN: General Hartmann --

MR. ENGEL: But if we're talking about the detention of hundreds of enemy combatants, and if we're asking -- federal habeas courts in the United States are to conduct these hearings, these are quite significant burdens that, you know, raise serious questions.

SEN. DURBIN: My last question. General Hartmann --

GEN. HARTMANN: Senator, just to add to that, we did bring people off the battlefield last week to testify and to allow the accused to witness them in the courtroom, to confront them and to cross-examine them.

SEN. DURBIN: Senator Kyl suggests that that's an unreasonable burden on our government. Do you believe it is?

GEN. HARTMANN: We were happy to do it, Your Honor.

SEN. DURBIN: I'm glad you were.

General Hartmann former Secretary of State Colin Powell has stated, quote, "We have shaken the belief the world had in America's justice system by keeping a place like Guantanamo open and creating things like military commissions. We don't need it, and it's causing us far more damage than any good we get for it." That was a statement, a quote, from General Colin Powell.

What is your opinion with regard to that statement?

GEN. HARTMANN: With regard to that statement, I would say that the military commissions are an honor to the American justice system. You should be very proud of what was written in the Military Commission Act, what is in the manual for military commissions, what is in the regulations, and about those people I described at the beginning of my testimony, senator -- those people who enforce the rights, five defense counsel at the table of Hamdan.

SEN. DURBIN: I would just say to you --

GEN. HARTMANN: He's given access to counsel. He's given the right to cross-examine --

SEN. DURBIN: General Hartmann, please --

GEN. HARTMANN: Those are the basic rights that are made available through the American justice --

SEN. DURBIN: Every time we question Guantanamo and its use, you and others say we are somehow questioning the integrity of the men and women in uniform. That is not a fact. None of us have, and none of us will. They are good and brave soldiers, and they are doing their duty for their country.

But the policymakers have to be held accountable for a situation at Guantanamo which has become an embarrassment for the United States around the world, as General Powell stated, very, very clearly.

GEN. HARTMANN: Senator --

SEN. DURBIN: I respect him as well, as a man who served his country.

GEN. HARTMANN: Yes, sir. The rights that are available are written down. The rights that are available are written down. They are rules of evidence that virtually mirror the military rules of evidence. The people that are enforcing those rights -- the judge, the prosecutor, the defense counsel -- are the same people who take the oath of office on other things. They are very similar.

SEN. DURBIN: But one of the most fundamental rights under justice of habeas corpus, to know why you're being detained, to know what you're charged with, and to confront your accusers, you can't argue to me that that is being protected. What I will argue to you --

SEN. FEINSTEIN: Senator, you are doing a Schumer. You are two- and-a-half minutes over your time. (Laughter, applause.) Oh, no, no, no, please.

GEN. HARTMANN: I will say in response to that, your -- Senator -- I keep calling you "Your Honor" -- the process in the courtroom is extraordinarily fair. The appellate process is unprecedented.

SEN. FEINSTEIN: Senator Graham, welcome.

SEN. LINDSEY GRAHAM (R-SC): Thank you, General. I would agree that we're finally getting this right, but I hope you don't ignore the fact that we had to pull teeth to get here, you know. One reason we haven't prosecuted anybody is we had some pretty really weird theories that the courts kept knocking down, and now we're back to a more traditional way of doing business. And I want to applaud the fact that we do have dedicated men and women who are serving their country well as prosecutors, defense attorneys and military jurors, but I'm not going to sit here and just ignore three-and-a-half years of trying to sell things that nobody would buy. Well, now we've about got it right, and I'm willing to make it better if we can.

Bottom line for me is that the big distinction between us and anyone else in the world, Mr. Engel, is that we consider the people we're fighting enemy combatants, not common criminals. Is that correct?

MR. ENGEL: I think that's right.

SEN. GRAHAM: I don't think there's another jurisdiction in the world that takes al Qaeda suspects and tries them under the theory of the law of armed conflict. We do. The reason we do is because of September 11th, 2001. This country has to reconcile itself as to how we want to proceed. Did the people who attack us, were they a group of common criminals afforded due process of law under domestic criminal law? If that's the case, nothing we do at Guantanamo Bay can move forward, you're right, Senator Durbin.

That is not my theory. My theory is that we've been in an undeclared state of war with un-uniformed combatants who wish to kill us all if they could. And when we capture one of them, we have the obligation of a great nation to follow the law of armed conflict, which is very robust, has a rich history -- which I have played a small role in, insignificant as it may be, I am proud of it -- and we've tried to bastardize that, and we've tried to change it, and we've tried to cut corners, and we've paid a price.

Now, as I understand military law, that once you capture somebody and their status is to be determined, that is a military decision, not a federal judge's decision, under the Geneva Convention. Is that correct, General Hartmann? Either one of you.

MR. ENGEL: I think that's exactly right.

SEN. GRAHAM: Under Article V of the Geneva Convention, it requires, if there's a question of status, whether or not you're an unlawful enemy combatant, a traditional prisoner or war or an innocent civilian, a competent tribunal will be impaneled to make that decision. Is that not what the Geneva Convention says?

MR. ENGEL: That's exactly right.

SEN. GRAHAM: Now, based on that, we have taken Article -- Regulation 190-1, I believe it is, the Army regulation --

MR. ENGEL: Dash-eight.

SEN. GRAHAM: -- dash-eight -- and we've enhanced it.

Now, the question for people like me is, should you provide military lawyers at the Combat Status Review Tribunal, something I wanted to do three years ago? I wish I had done it now, because the reason I wish I had done it is, even though it's unprecedented, in traditional wars we assumed the war would be over when the powers met and declared an end to it. Do either one of you believe there will be a surrender ceremony in your lifetime regarding the war

on terror?

GEN. HARTMANN: I'm unable to answer that.

SEN. GRAHAM: Yeah. I will answer it for you: No. Never in my lifetime will some politician declare this war over and let everybody at Guantanamo Bay go. That's not going to happen. So what we need, I think, gentlemen, is an understanding we're at war but it's a different kind of war.

And to General -- Senator Sessions' comment, how did we let these people go, well, what we have at Guantanamo Bay is an initial decision-making process by the military, "You're an enemy combatant, unlawful enemy combatant." And every year, Senator, we look at the case anew. We look for three things. Is there any new evidence to change your status? Do you still have intelligence value that would be useful to the war? And third, are you a threat? And a board of officers meets every year, and you can have new input from the detainees' point of view along those three lines.

And we have let over 400 people go using that annual review board process. Unfortunately -- you're right, Senator Sessions -- 30 have gone back to the fight. We are at war.

SEN. SESSIONS: Thirty have been caught.

SEN. GRAHAM: Thirty have been caught, and who knows what the others are doing.

But having said that, Senator Sessions, I think it is incumbent upon us to have a hybrid process, because if we don't, the initial decision is a de facto life sentence. And I am proud of this process.

And when it comes to your side, General Hartmann, if there is an allegation that the evidence in question is tainted because it's a result of torture, it is my understanding the military judge must exclude any evidence that violates the torture statute; is that correct?

GEN. HARTMANN: Any statement obtained through torture is inadmissible.

SEN. GRAHAM: And as to an allegation of coercion, which our enemy is trained to allege -- al Qaeda operatives are trained into the American legal system. They know exactly what to say. It's my understanding at Guantanamo Bay the military judge will have a hearing regarding the allegation of coercion and will decide whether or not the evidence is reliable and should go to the finder of fact. Is that correct?

GEN. HARTMANN: Reliable, probative, and in the best interest of justice.

SEN. GRAHAM: And that judicial decision by that judge can be appealed to the civilian courts?

GEN. HARTMANN: That's correct. It can be appealed to the civilian courts after going through the military process.

SEN. GRAHAM: It is my understanding that every detainee at Guantanamo Bay, Senator Durbin, will have their day in federal court; that every decision by the military will be reviewed by the D.C. Circuit Court of Appeals, and that is ongoing right now.

The difference I have with you, my friend, is I don't want to turn over to the federal judges in this country the ability to determine the enemy for us in the first instance, because they're not trained to do so. That is a military decision. But I do not mind any judge in this -- any appellate court in this land looking over the shoulder of these gentlemen here to make sure they get it right. I think that is the sweet spot for this country.

Now, when it comes to whether or not there's political influence on these trials, Senator Feinstein, I want to get to the bottom of this. Now, I know Mo Davis (sp) and I know you. I've been an Air Force JAG for 25 years. I respect

you both. And I want to find out the best I can what's going on down there.

But I would like to just tell my good friend Senator Durbin, if we close Guantanamo Bay -- and maybe we should -- where do we send them and what do we do with them? And the only thing I ask of my colleagues is that as we try to correct the process and improve it -- and I think there's ways that we can go forward to make it better -- please don't lose sight that the people that we're dealing with, the truly guilty, are warriors, not domestic common criminals. And those who've been caught up in this net of trying to find out who the enemy is, some of them are probably either on the fringes or just at the wrong place at the wrong time, and that's been the nature of war as long as man has been engaged in war. What I'm looking for is not the outlier case where they went back to killing Americans -- because if you do that, nobody ever gets released -- or the idea that they're all victims and just at the wrong place at the wrong time. All we can hope to find as a nation is a process that will be flawed, but still adheres to our values. And I think we're very close to that process being correct in terms of us being at war.

Now, one of the issues facing this country is waterboarding. General Hartmann, do you believe waterboarding violates the Geneva Convention?

GEN. HARTMANN: I was asked that earlier, Senator. And with regard to this entire issue, we start with the following premise: torture is illegal in the United States.

SEN. GRAHAM: We have a downed airman in Iran. We get a report that the Iranian government is involved in the exercise of waterboarding that downed airman on the theory they want to know when the next military operation may occur. What would be the response of -- what should be the response of the uniformed legal community regarding the activity of the Iranian government?

GEN. HARTMANN: I'm not equipped to answer that question, Senator.

SEN. GRAHAM: You are.

GEN. HARTMANN: I will tell you the answer to the question that you asked in the beginning, Senator, and that --

SEN. GRAHAM: You mean you're not equipped to give a legal opinion as to whether or not Iranian military waterboarding -- secret security agents waterboarding downed airmen is a violation of the Geneva Convention?

GEN. HARTMANN: I am not prepared to answer that question, Senator. I am --

SEN. GRAHAM: Thank you. I have no further questions.

SEN. FEINSTEIN: Thank you very much, Senator. That completes this round. I'd like to just quickly make a brief comment.

I think Senator Sessions and Senator Graham have pointed out some interesting things, which indicate a real dichotomy in this situation that all of us have to deal with.

The first is the undeclared state of war, which is this situation. Senator Sessions pointed out that there is no requirement to try detainees toward the -- during the course of hostilities. Of a declared war, that is true. The president himself has said this could go on for a generation. And if you look at the history of terrorism in the world, it is likely to go on. Ergo, what happens to people who are not charged, who remain in custody for what period of time?

I'm going to ask and will send you in writing, both of you, a question. And that question will be, what is the government's plan to deal with the indefinite detention without charge of detainees for what may be decades? And I think we have to come to grips with that question. I think there has to be an answer. And if we need to legislate, we should.

With respect to Guantanamo and its closure, we've just done an inventory of supermax beds, and if there are 305 detainees currently, then we can add up those supermax beds and come to 326 available beds today in the United States between maximum security military brigs and maximum security federal prisons. So I think we have to come to grips with both of those and whether Guantanamo, left the way it is over the next half-decade, decade, really redounds to the credibility of this nation or whether it destroys that credibility.

And here we have different opinions. There are those that believe it does and there are those of us that believe it does not. And I think that's a real question. So we will put this in writing to both of you, and we will follow up. So we will not forget, so please answer the questions.

Thank you very much. We appreciate that.

MR. ENGEL: Thank you, ma'am.

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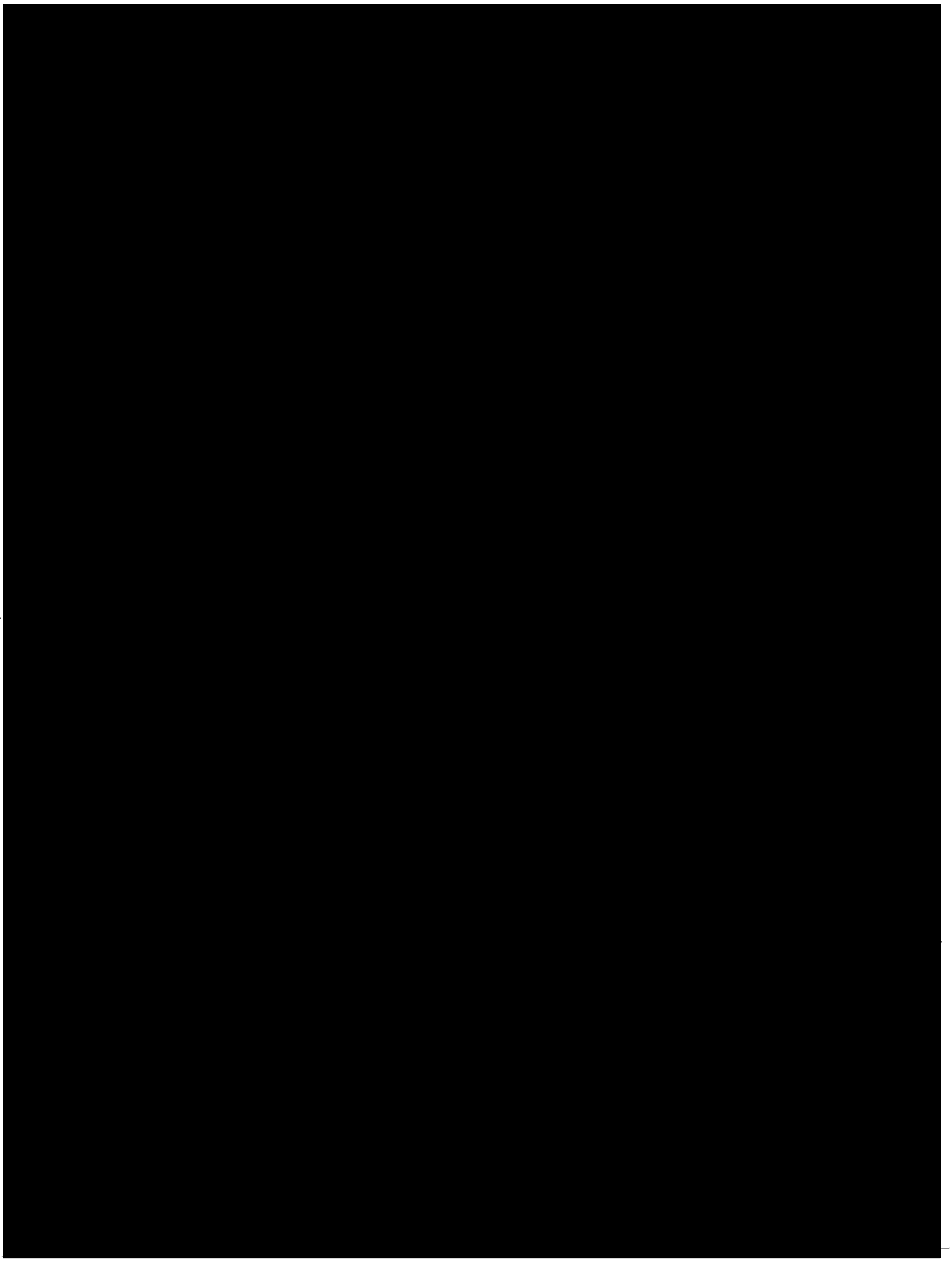
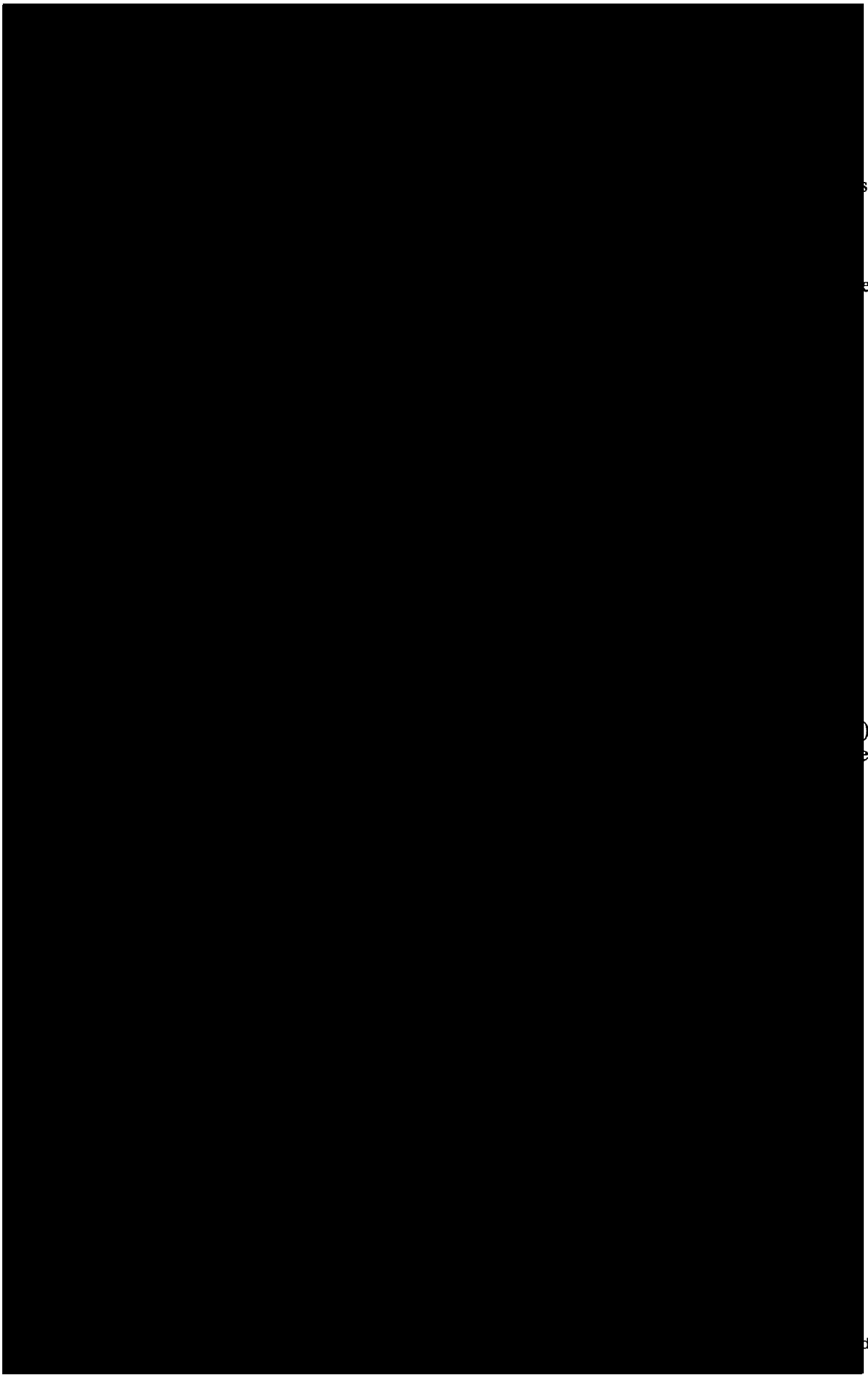
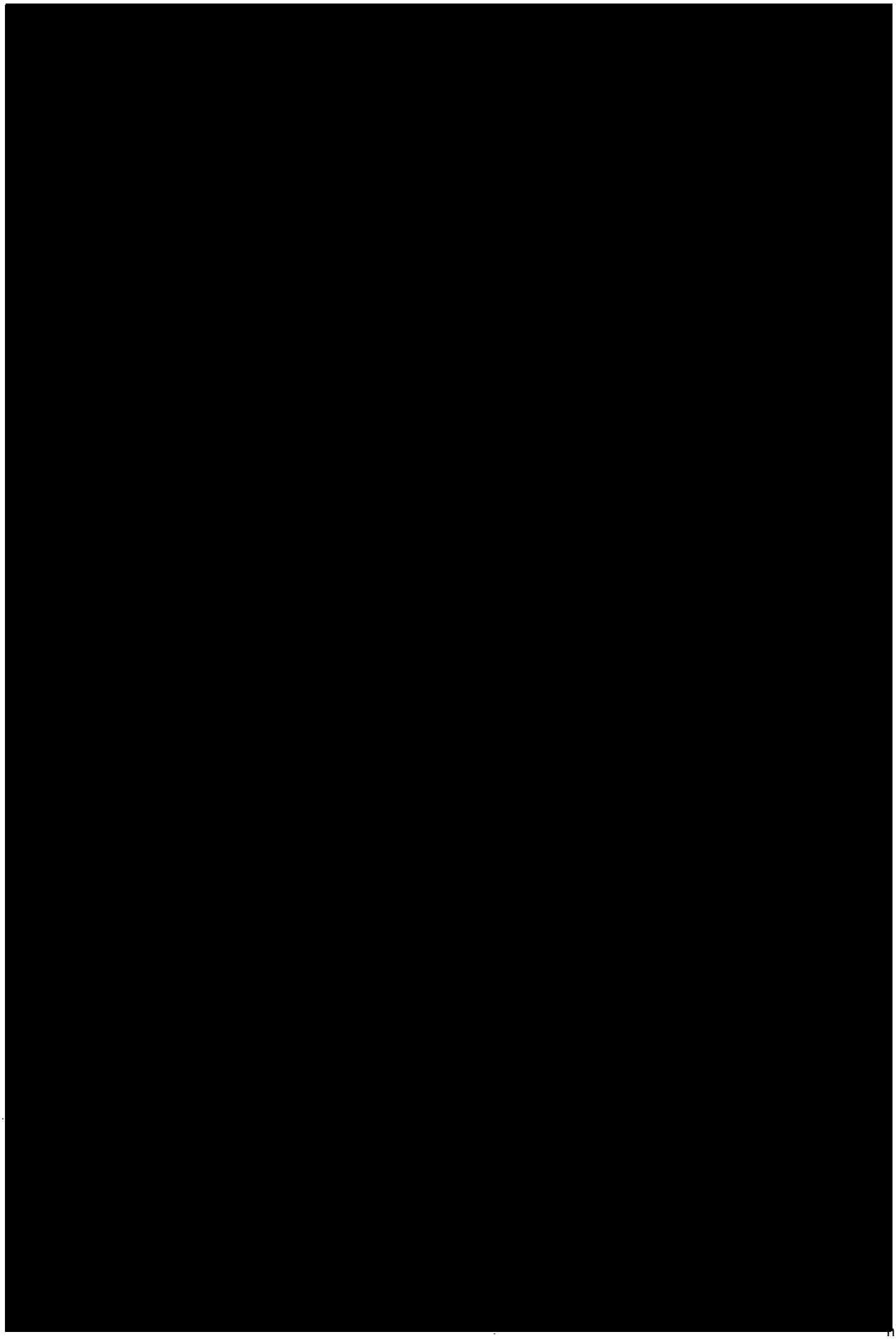
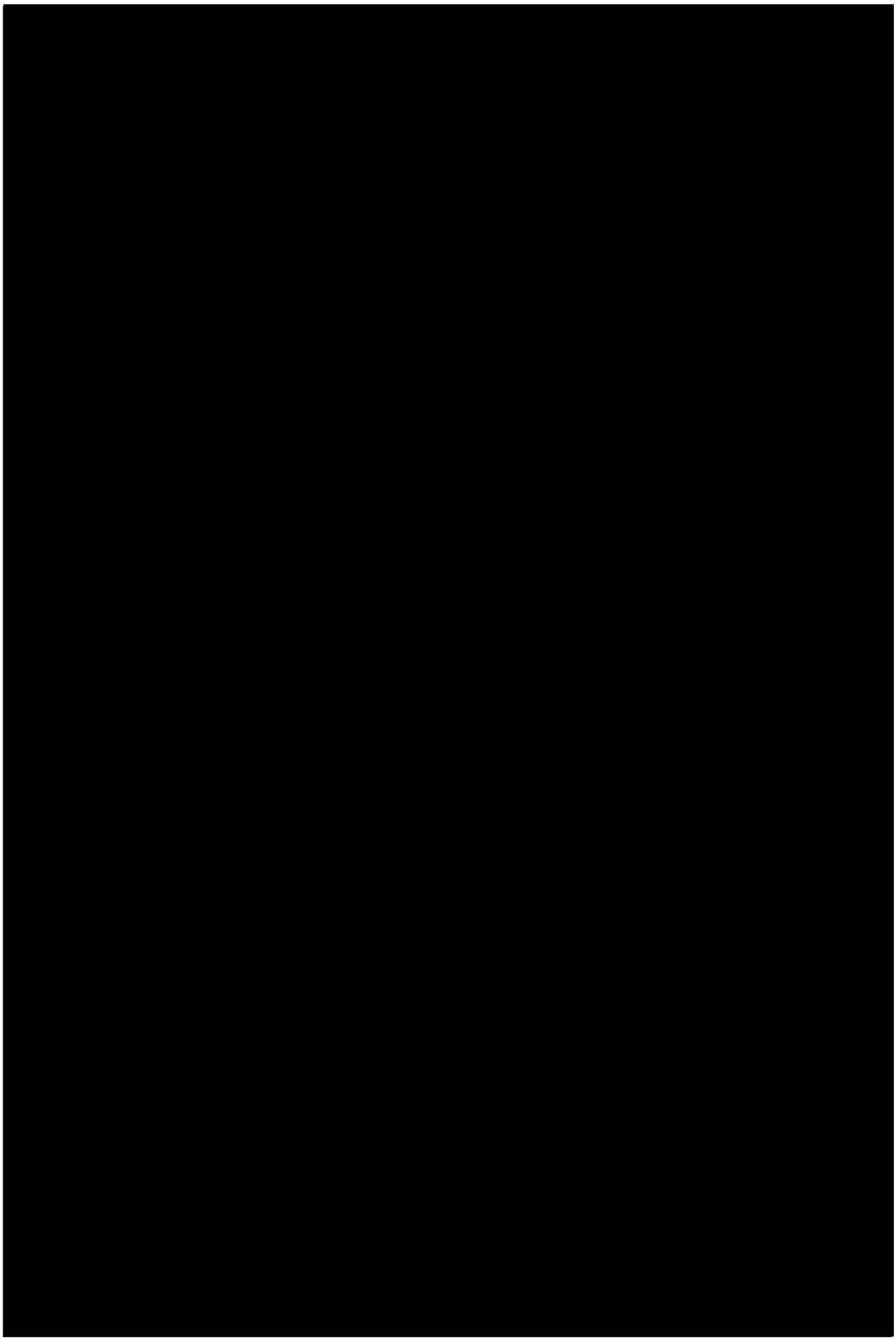
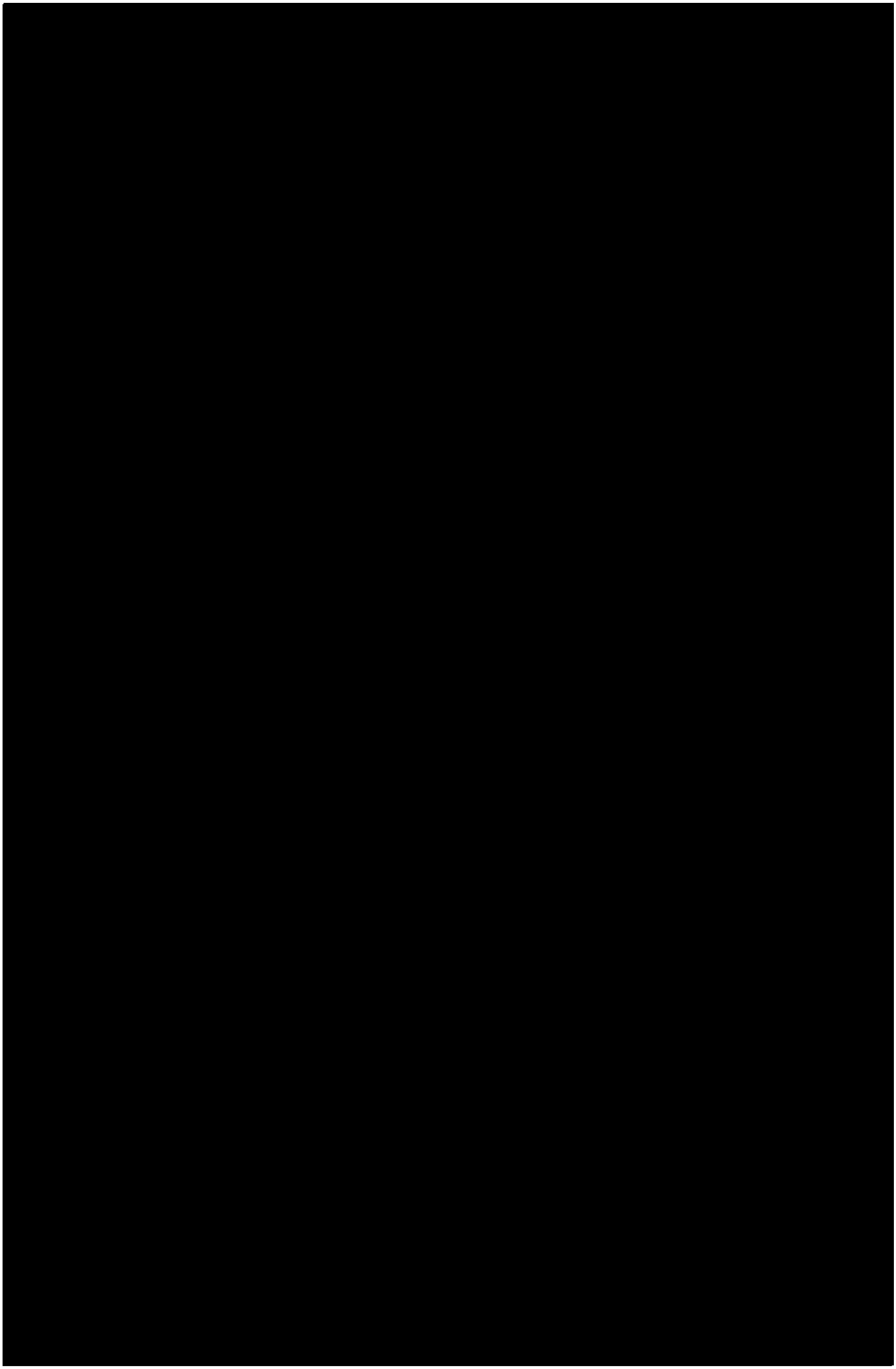
Attachment C

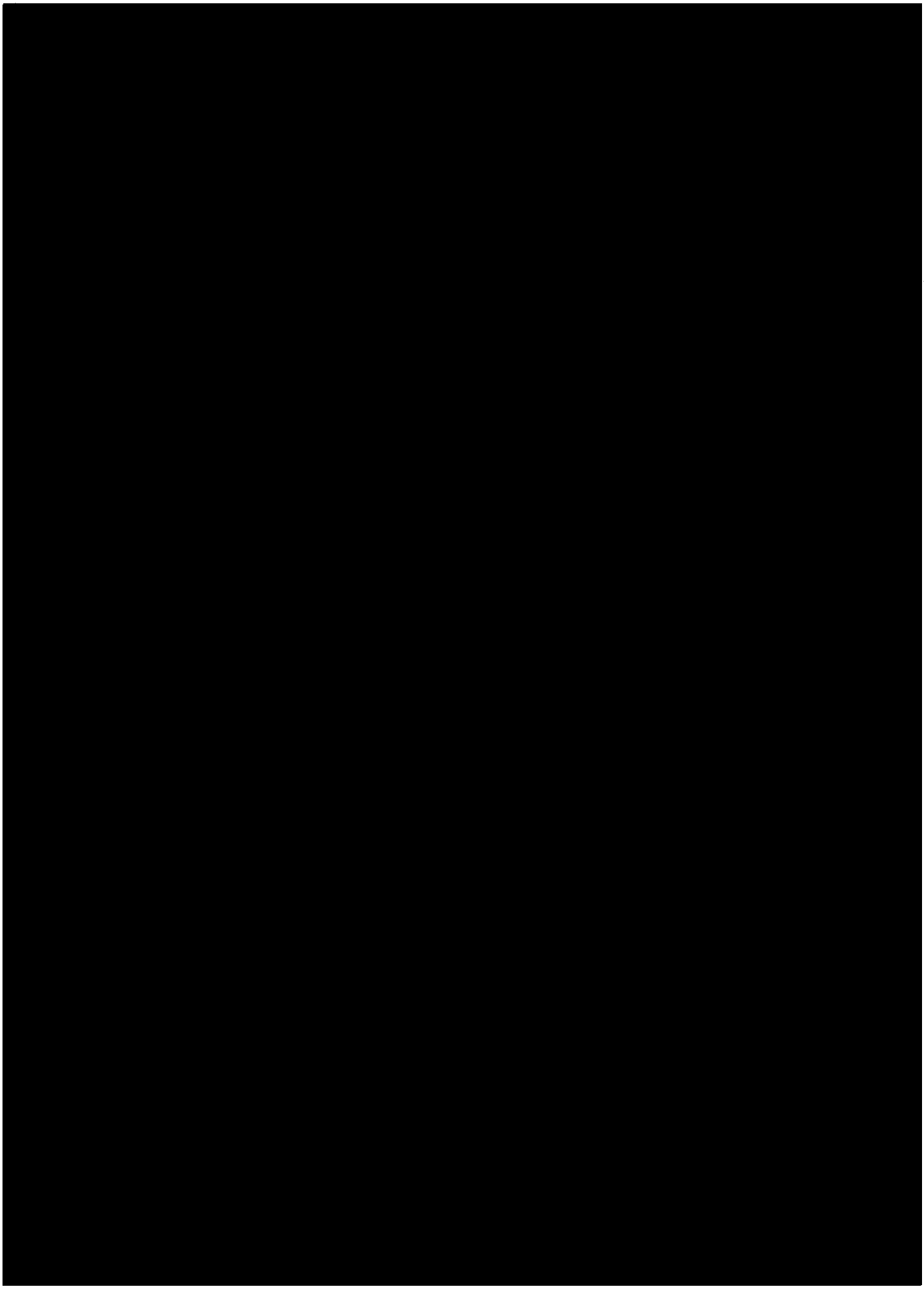












Attachment D

THE DEPUTY SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

OCT - 3 2007

MEMORANDUM FOR LEGAL ADVISOR TO THE CONVENING AUTHORITY FOR MILITARY COMMISSIONS

SUBJECT: Appointment of Brigadier General Thomas Hartmann as the Legal Advisor to the Convening Authority

Effective July 1, 2007, you were appointed Legal Advisor to the Convening Authority (Legal Advisor). As such, you serve in the Office of the Convening Authority and report to the Deputy General Counsel (Legal Counsel) of the Department of Defense (DGC (LC)).

The duties and responsibilities of the Legal Advisor are as set forth in the Manual for Military Commissions and the Regulation for Trial by Military Commissions, and as otherwise directed by the DGC (LC). The duties of the Legal Advisor include providing legal advice and recommendations to the Director of the Office of the Convening Authority (Director) and the Convening Authority, and supervising the Chief Prosecutor. While supervising the Chief Prosecutor you will insure that you maintain the ability to objectively and independently provide cogent legal advice to the Director and the Convening Authority.

The DGC (LC) shall directly supervise you in the performance of your duties as Legal Advisor. The DGC (LC), as your reporting senior, shall fulfill all performance evaluation responsibilities of you as the Legal Advisor normally associated with the function of a direct supervisor in accordance with your Military Service's performance evaluation regulations.

10-3-07

cc:
General Counsel of the Department of Defense
Convening Authority for Military Commissions
Director of the Office of the Convening Authority
Deputy General Counsel (LC)

THE DEPUTY SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

OCT - 3 2007

MEMORANDUM FOR CHIEF PROSECUTOR, OFFICE OF MILITARY COMMISSIONS

SUBJECT: Appointment of Colonel Morris D. Davis as the Chief Prosecutor for Military Commissions

In August 2005 you were appointed Chief Prosecutor, Office of Military Commissions. Following the enactment of the Military Commissions Act of 2006 (MCA), the Secretary of Defense reaffirmed this appointment (Memorandum for Deputy Secretary of Defense, Implementation of the Military Commissions Act of 2006, November 17, 2006).

The duties and responsibilities of the Chief Prosecutor are as set forth in the Military Commissions Act of 2006, Manual for Military Commissions (MMC), the Regulation for Trial by Military Commissions (Regulation), and as otherwise directed by the Chief Prosecutor's reporting senior. The duties of the Chief Prosecutor include the supervision of the overall prosecution efforts under the MCA, the MMC, and the Regulation, and the proper management of the personnel and resources of the Office of the Chief Prosecutor.

The Chief Prosecutor reports to the Legal Advisor to the Convening Authority (Legal Advisor), consistent with the authorities cited above. The Legal Advisor shall directly supervise you in the performance of your duties as Chief Prosecutor. The Legal Advisor, as your reporting senior, shall fulfill all performance evaluation responsibilities associated with the function of a direct supervisor in accordance with your Military Service's performance evaluation regulations.

Gordon England
10-3-07

cc:
General Counsel of the Department of Defense
Convening Authority for Military Commissions
Legal Advisor to the Convening Authority

Attachment E

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

MAR 3 2008

MEMORANDUM FOR LCDR Brian Mizer, Detailed Defense Counsel of Salim Ahmed Hamdan

SUBJECT: U.S. v. Hamdan: Response to Request for Additional Hours for Psychiatric Expert Witness

I have received your 12 February 2008 request for additional funding for Dr. Emily Keram in the amount of $33,500. After careful consideration, I deny your request at this time. On 18 September 2007, I requested additional justification before I approved a previous request for more hours of psychiatric evaluation and expert testimony at government expense. Specifically, I requested that you justify your request in light of the factors set forth in *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005), provide a brief discussion to satisfy Sections IV and VII of the Military Commissions Rules of Evidence, and offer a detailed evaluation plan. I am aware of no further information from you on this.

Your current request seeks approval of expenditures to support new defense theories, but does not provide the level of detail I previously requested. Your request does not clarify how the expert could outline the alleged punitive nature of confinement; nor does it allude to the nature of any allegedly coercive interrogation techniques. Since your request does not contain sufficient information, I am unable to grant it at this time.

Susan J. Crawford
Convening Authority
For Military Commissions

Attachment F

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

12 March 2008

MEMORANDUM FOR LCDR Brian Mizer, Detailed Defense Counsel

SUBJECT: *U.S. v. Hamdan*: Response to Request for Expert Witness (Professor Williams)

I have reviewed your 6 March 2008 request to employ Professor Brian Williams as an expert witness in light of the Military Judge's Ruling on Motion to Dismiss (Unlawful Combatant Status). I conclude that your request makes an insufficient showing that Professor Williams' proposed testimony is relevant and necessary under Rules for Military Commission 703(b)(1) and (d).

According to your expert witness request, Professor Williams would testify that Taliban and Ansar forces were under the control of the Taliban government, did not direct hostilities toward protected persons, and were conventional fighting forces not involved in terrorism. The request states that Professor Williams' testimony will be relevant to rebut allegations in the charge sheet "by showing that [the] nature and character of hostilities surrounding the siege of Kandahar and the particular characteristics of the enemy fighting forces involved in such combat were within generally accepted criteria for lawful combat...."

In light of the Military Judge's ruling of 7 March 2008, the request fails to tie Professor Williams' proposed testimony to a material issue in the case. According to the ruling, in order to raise the defense of lawful combatancy, "Hamdan must show some evidence that he was a member of the armed forces or a regular militia of a nation, that he wore a uniform or some other distinctive insignia or mark, that he carried arms openly, and that he and the military organization of which he was a part conducted their operations in accordance with the law of war." Ruling on Motion to Dismiss (Unlawful Combatant Status), at 2. The request does not address any of these factors. Additionally, this appears to be a factual issue rather than one requiring expert testimony. Without evidence that Hamdan was associated with the Ansars, expert testimony regarding the Ansars does not appear to be relevant.

I encourage you to continue to pursue your request and to follow up with any concerns.

Susan J. Crawford
Convening Authority
For Military Commissions

Attachment G

3 of 3 DOCUMENTS

Federal News Service

February 11, 2008 Monday

SECTION: DEPARTMENT DEFENSE BRIEFING

LENGTH: 5260 words

HEADLINE: DEFENSE DEPARTMENT BRIEFING;
BRIEFER: BRIGADIER GENERAL THOMAS HARTMANN, LEGAL ADVISOR TO THE CONVENING AUTHORITY IN THE DOD OFFICE OF MILITARY COMMISSIONS;
LOCATION: DOD BRIEFING ROOM, THE PENTAGON, ARLINGTON, VIRGINIA

BODY:

DEFENSE DEPARTMENT BRIEFING BRIEFER: BRIGADIER GENERAL THOMAS HARTMANN, LEGAL ADVISOR TO THE CONVENING AUTHORITY IN THE DOD OFFICE OF MILITARY COMMISSIONS LOCATION: DOD BRIEFING ROOM, THE PENTAGON, ARLINGTON, VIRGINIA TIME: 11:00 A.M. EST DATE: MONDAY, FEBRUARY 11, 2008

BRYAN WHITMAN (Pentagon spokesman): Well, good morning and welcome. Today, we have reached a significant legal milestone in the history of our operations at Guantanamo. As you know, over the past several years we've been moving forward with the military commission process, which holds accountable individuals accused of alleged war crimes. Since 2004 we've had dozens of pretrial hearings that have been held on a total of 12 detainees at military commissions. Under the Military Commissions Act of 2006 one was found guilty of material support to terrorism last year. Two are currently facing trial dates in the next several months, and several are in various early stages of the commission process.

But here today we have to announce new sworn charges and to discuss the military commissions process and these new charges today is Air Force Brigadier General Thomas Hartmann, who is the legal advisor to the Convening Authority for the Office of Military Commissions.

And with that, General, why don't I let you walk them through this.

GEN. HARTMANN: Good morning.

Today, the Convening Authority for Military Commissions received sworn charges against six individuals alleged to be responsible for the planning and execution of the attacks upon the United States of America, which occurred on September the 11th, 2001.

These attacks resulted in the death of 2,973 people, including eight children.

These charges allege a long-term, highly sophisticated organized plan by al Qaeda to attack the United States of America.

The accused are Khalid Sheikh Mohammed, Walid Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, Mustafa

Ahmed Adam al Hawsawi and Mohammed al Kahtani.

Now that sworn charges have been received, the Convening Authority will review the charges and supporting evidence to determine whether probable cause exists to refer the case to trial by military commission.

The chief prosecutor has requested that the charges be tried jointly, and that they be referred as capital for each defendant. If the Convening Authority, Mrs. Susan Crawford, in her sole discretion, decides to refer the cases as capital, the defendants will face the possibility of being sentenced to death.

Each of the defendants is charged under the Military Commission Act with the crime of conspiracy and with the separate substantive offenses of murder in violation of the law of war, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, destruction of property in violation of the law of war, terrorism and material support to terrorism.

The first four defendants -- Khalid Sheikh Mohammed, Walid Bin 'Attash, Ramzi Binalshibh and Ali Abdul Aziz Ali -- are also charged with the separate substantive offense of hijacking or hazarding an aircraft. All the charges are alleged to have been in support of the attacks on the United States of America on September the 11th, 2001. The charge sheet details 169 overt acts allegedly committed by the defendants and their uncharged co-conspirators in furtherance of the 9/11 events.

The charges allege that Khalid Sheikh Mohammed was the mastermind of the 9/11 attacks by proposing the operational concept to Osama bin Laden as early as 1996, obtaining approval and funding from Osama bin Laden for the attacks, overseeing the entire operation and training the hijackers in all aspects of the operation in Afghanistan and Pakistan.

Walid Bin 'Attash is alleged to have administered an al Qaeda training camp in Logar, Afghanistan, where two of the September 11th hijackers were trained. He is also alleged to have traveled to Malaysia in 1999 to observe airport security by U.S. air carriers to assist in formulating the hijacking plan.

Ramzi Binalshibh is alleged to have lived in the Hamburg, Germany, al Qaeda cell where three of the 9/11 hijackers resided. It is alleged that Binalshibh was originally selected by Osama bin Laden to be one of the 9/11 hijackers and that he made a martyr video in preparation for the operation. He was uncertain -- he was unable to obtain a U.S. visa and therefore could not enter the United States as the other hijackers did. In light of this, it is alleged that Binalshibh assisted in finding flight schools for the hijackers in the United States and continued to assist the conspiracy by engaging in numerous financial transactions in support of the 9/11 operation.

Ali Abdul Aziz Ali's role is alleged to have included sending approximately $127,000 to the hijackers for their expenses and flight training and facilitating the travel to the United States for nine of the hijackers.

Mustafa Ahmed Adam al-Hawsawi is alleged to have assisted and prepared the hijackers with money, Western clothing, travelers checks and credit cards. He is also alleged to have facilitated the transfer of thousands of dollars between the 9/11 hijackers and himself on September the 11th, 2001.

Mohamed al Kahtani is alleged to have attempted to enter the United States on August the 4th, 2001, through the Orlando International Airport, where he was denied entry. It is also alleged that al Kahtani carried $2,800 in cash and had an itinerary listing a phone number associated with al-Hawsawi.

Now that the charges have been sworn, they are being translated into the native language of each of the accused and served on them. I will evaluate the charges and all of the supporting evidence, along with the chief prosecutor's recommendation, and I will forward them with my independent recommendation to Mrs. Susan Crawford, the convening authority for the Military Commissions.

She will review all of the information and make her independent decision whether to refer any or all of the cases to trial by military commission and, if so, whether to refer them as capital. Just as in military court martial practice, the pretrial advice must contain my legal conclusions, as well as whether the charges are supported by probable cause, are subject to jurisdiction by the military commission and should be tried by military commission.

The convening authority's final decision follows her review and consideration of my advice, the file provided by the prosecutors and any national security concerns. This is very similar to the sequence of events that occurs in military legal offices thousands of times a year, all around the world. If the convening authority refers the charges to trial, the prosecution bears the burden of proving the case beyond a reasonable doubt, which is the standard applied in all U.S. and military criminal trials.

In the military commission process, every defendant has the following rights. The right to remain silent and to have no adverse inference drawn from it. The right to be represented by detailed military counsel, as well as civilian counsel of his own selection, at no expense to the government. The right to examine all evidence used against him by the prosecution. The right to obtain evidence and to call witnesses on his own behalf, including expert witnesses. The right to cross-examine every witness called by the prosecution. The right to be present during the presentation of evidence. The right to have military commission panel of at least five military members determine his guilt by a two-thirds majority or, in the case of a capital offense, a unanimous decisions of a military commission composed of at least 12 members. The right to an appeal to the Court of Military Commission Review, then through the District of Columbia Circuit Court of Appeals to the United States Supreme Court.

These rights are guaranteed to each defendant under the Military Commission Act and are specifically designed to ensure that every defendant receives a fair trial, consistent with American standards of justice. The sworn charges, prepared by the joint team of military and Department of Justice prosecutors, highlight the tremendous cooperative efforts put forth by a multitude of government agencies, and reflect the continued progress of the military commissions.

And as the legal advisor to the Convening Authority, I remind you that the sworn charges are only allegations, only allegations of violations under the Military Commission Act, and that the accused are and will remain innocent unless proven guilty beyond a reasonable doubt.

Take your questions.

Q Sir, can you talk about the steps once more but with a timeframe? How soon would Crawford come back with her decision? When might trials start?

GEN. HARTMANN: There's no specific statutory time specified for Judge Crawford to review the file. We will receive the file, I expect, later in the week, and we will work on it very quickly, as quickly as we can with the entire staff focused on that.

I can't give you a specific time frame. When Judge Crawford completes her review and should she decide to refer the case to trial, then 30 days following that the accused will be arraigned, within 30 days the accused will be arraigned, and that means that they'll be read the charges in court and have the opportunity to enter a plea.

One hundred twenty days after Judge Crawford refers the case the court is assembled. That means the jury is brought in or the members -- the panel members, the military panel members. In between that time, there will certainly be discovery and motions as there have been in the past, so I expect that the 120 days will push out, but you will have -- after the arraignment, you will begin to see activity in the courtroom in terms of discovery and motions and that sort of thing.

As to when you would see what most people call a trial, the taking of evidence in front of a jury, I can't predict that at this time, but it will be certainly at least 120 days and probably be well beyond that -- beyond the time Judge Crawford makes her referral decision.

Q There'll at least be some court activity by May or June.

GEN. HARTMANN: We expect there to be some, but I -- don't hold me to that. I can't predict that.

Yes?

Q Sir, would you expect that KSM confession during his CSRT would be admissible given the fact that the CIA has been -- said that it used the waterboarding technique during the interrogation?

GEN. HARTMANN: All of the issues with regard to the admissibility of evidence and the decision of what evidence to produce and to try to bring into the court will be the decision of the prosecutors. That's not my decision. We have the rule of law. We have a Military Commission Act that's been determined by the Congress and the president, supported by the Department of Defense. We will follow the rule of law. We will apply the rule of law. And evidence with regard to the admissibility of evidence will be determined by the prosecution and the defense fighting out and a military judge making that decision.

Q Two questions. What about the destruction of evidence, as in the destruction of the KSM tape. And you used the word "jointly;" were you saying that all six are going to be tried together?

GEN. HARTMANN: Yes. All six are going to be tried together. The -- all six have been recommended for trial together. The chief prosecutor has recommended that all six be tried jointly. That decision remains in the discretion of Judge Crawford as to whether she will refer them jointly, and then that can also be challenged. Even if she should refer them jointly, that can still be challenged.

As to the destruction of evidence, I'm not familiar with the details of that, and again that matter will be decided in the courtroom, among the prosecutors and the defense, in front of the military judge. And they will decide the extent to which any possible destruction of evidence has an impact on these cases.

Q Two questions.

Can you clarify the death penalty issue? Do the sworn charges recommend that these be taken as capital cases? Or is that an option for you and Judge Crawford?

And I had a second question.

GEN. HARTMANN: The answer to both is yes. They recommend that they be referred to trial as a capital case, and Judge Crawford will make the decision as to whether to actually refer them to trial as capital. That's her decision, her sole discretion.

Q I have a question on KSM. Among the more high-profile claims he made was that he killed Wall Street Journal journalist Daniel Pearl with his blessed right hand, I think, was the phrase. Is that one of the charges in the sheet we'll see today?

GEN. HARTMANN: That is not one of the charges in this case.

Q Why not?

GEN. HARTMANN: That is -- the case you have before you is the case that has been brought to me by the chief prosecutor, through his prosecutors. This is the level of evidence they have on these cases. If there is a decision to try somebody else for the Pearl case, that decision will be made later.

Q In terms of the trial, is it fair to assume that it will be completely public? And also in terms of classified evidence, will that also be made public during the course of the trial?

GEN. HARTMANN: That's a good question, and I'll try to answer them both in the same answer.

As to classified, there will be no secret trials. Every piece of evidence, every stitch of evidence, every whiff of evidence that goes to the finder of fact, to the jury, to the military tribunal will be reviewed by the accused, subject to confrontation, subject to cross- examination, subject to challenge, exercising the rights I described to you before.

In terms of the openness of the trial, it is our goal to have the trials as completely open as possible. They're designed for that. We've has more than 100 members of the press down to the commissions before, 30 more recently, and then there were sessions last week where the commissions were present. So we will make every effort to make everything open.

There may be limited circumstances in which classified evidence will be presented. Classified evidence is classified for the purpose of protecting the national security interest and our soldiers, sailors, airmen and Marines in the field, and other operatives. So to the extent that that is necessary, we will apply that standard in the courtroom.

I've been advised by the prosecutors that relatively little amounts of evidence will be classified, but it's still a possibility. And we have rules and procedures, and rules of evidence, in place to deal with that.

Q Do you have concerns that the CIA may not provide the prosecutors with some of the evidence that they extracted while some of these detainees were held in secret prisons, or perhaps waterboarded?

Are you finding it difficult to get that information from the CIA?

GEN. HARTMANN: We're very appreciative of the total interagency effort that has gone on among the law enforcement, intelligence and legal community, and that will be decided in the courtroom when the prosecution decides what evidence it needs to present, as to whether there are any debates or disputes about the availability of the evidence, but I'm not aware of any at this time.

Q How many of these detainees actually have lawyers at this point in time, military or civilian?

GEN. HARTMANN: Of all the detainees?

Q Of the six that were -- (off mike).

GEN. HARTMANN: Of the six, the -- effective today with the swearing of charges, they will be entitled to a detailed military counsel, so that'll occur after today.

Q Can you tell us, was any of the information that was derived from aggressive -- from aggressive interrogations of either KSM or any of the other five defendants used in preferring these charges?

GEN. HARTMANN: I don't know the answer to that question. The prosecutors will make a determination about what evidence they are going to produce in the case in chief. I haven't seen the files yet, and they will -- that will identify to us what evidence is used. But let me be clear: We are a nation of law and not of men. And the question of what evidence it will be admitted, whether waterboarding or otherwise, will be decided in the courts, in front of a judge, after it's fought out between the defense and the prosecution in these cases. That's the rule of law, that's the procedure that Congress has provided to us, and that's what we will use to finally answer these questions.

Q But just based -- excuse me, a follow-up. But just based on your own legal expertise, is that kind of evidence normally permissible against the defendant if it's -- if it's achieved through duress?

GEN. HARTMANN: Well, I'll answer the same question. It's not -- this issue is not based upon my legal experience. This issue is based upon the rule of law. And the military judge will decide if this evidence is going to be admitted. That's the procedure we have set up. That's the American standard of justice, that the court decides, the judge

decides.

And so we're very proud of the system that we've set up with all the rights we've defined here; that the accused will have the opportunity to have his day in court and to challenge these things to the extent they're even presented. I can't predict that anything like that will be presented, but to the extent it is, it will be in open court.

Q And a technical question, just a very quick technical question, please. Is the appeal process in a capital case like this automatic, as it is in some civilian courts?

GEN. HARTMANN: That's an excellent question. In this process, unlike --

Q Finally. Two out of three. (Laughter).

GEN. HARTMANN: In this process -- and it's quite a unique process -- if the accused is found guilty of anything, he gets an automatic right of appeal through the Court of Military Commission Review, very similar to the military process but very dissimilar to any other process. It's an extra right for the accused in this case.

And in addition, let me say this. Before he even gets to that, his sentence and the charges would again be reviewed by the convening authority; again, another right that doesn't exist anywhere on Earth except in the military system.

So it's an extraordinary set of rights that we're providing to the accused. And just so you know, at Nuremberg there were no rights of appeal.

Q Just to be clear about the admissibility of some of this evidence. You don't take that into account in your looking at the charges, nor does Judge Crawford?

GEN. HARTMANN: We take that into account in determining whether there's probable cause to proceed, whether there's probable cause or reasonable cause to believe that the accused committed these offenses and if there's jurisdiction. But we have to look at the files before we make any determination.

Q But you will -- excuse me, you will make a decision on the admissibility of that particular evidence?

GEN. HARTMANN: We'll make a decision as to whether we think the evidence is admissible or not.

Q Well, I want to follow up on -- (off mike) -- now I'm really confused. But let me ask you first, in the -- you speak of rule of law. Is there anything in your law or procedure for these matters that allows you to compel the intelligence community on discovery? Do you only ask them or can you compel them for full discovery?

And I'm now confused about the second part of what you just said. When you decide, and Judge Crawford, on the admissibility of the evidence in the charges preferred to you, do you have information on how this evidence came into being?

GEN. HARTMANN: As to your first question, I have very little power to compel anyone to do anything. So I'm -- we are not in the position to compel any other government agency to produce information.

As to the general question about Judge Crawford's role, my point is that we will evaluate the evidence that comes to us and review it to determine if there's probable cause. I don't know the source of the information that's coming to us. I don't know what that information is. So once we see that information we will evaluate it and apply a legal standard to determine whether there's probable cause to proceed. And a variety of factors is used in making that evaluation.

Judge Crawford has 15 years on the bench as -- on the Court of Appeals of the Armed Forces. She was the general counsel to the Army and also the DOD IG, so she has a great deal of background in terms of evaluating these things. And that's how we'll proceed. And I will do a similar review before it gets to her.

Q So, to be clear, in fact the military process here -- you basically have to take whatever the intelligence community tells you at face value. You have no independent means of discovery on the U.S. intelligence community.

GEN. HARTMANN: Well, we receive -- whatever evidence we receive, we receive it from the various communities, and the law enforcement, intelligence community, and we use that evidence and proceed with the evidence that's been provided. It's been a very cooperative effort.

Q And could I just also ask you one -- it can't, you know, sort of escape notice. You're standing here in the Pentagon announcing charges against the men believed to be responsible for the 9/11 attacks, including on this building that morning. Just wondering your thoughts as a general officer in the United States military; it must be a fairly compelling experience for you.

GEN. HARTMANN: I'm glad to be an American, proud to be an officer in the United States Air Force in the military, and we are going to move the process forward.

It's our obligation to move the process forward, to give these people their rights. We are going to give them rights. We are going to give them rights that are virtually identical to the rights we provide to our military members, our soldiers, sailors, airmen and Marines who fight in the battlefield and I think we'll all agree are national treasures.

So thank you for asking that question.

Q Where were you on the morning of 9/11?

GEN. HARTMANN: I was working in a civilian company. I'm recalled to active duty.

Q Sir, can I ask a question and then a follow-up on Guy's question. There's currently not a facility on Guantanamo to actually have the death penalty. Can you talk to whether -- if the death penalty actually occurs, whether a facility will be constructed at Guantanamo, if someone will be brought back to the United States to do that? And the follow-up is, on the classified evidence, you said that the defense will have all the opportunity to challenge, to review. In prior proceedings that has only been done through the Offices of Military Counsel, but the defendant himself has not been to look at it, neither -- or nor his civilian attorney if he hires one. Is there a change there? Is actually the defendant himself or a civilian attorney allowed now to take a look at that during the procedure?

GEN. HARTMANN: Let me answer the first one. The -- as regard to the death penalty, we're a long way from determining for even focusing on this press conference procedures with regard to the death penalty. First of all, Judge Crawford has to make a decision that she will refer some or all of them as death eligible. Following that, at least 12 jury members, 12 tribunal members must conclude unanimously that the accused committed the offense. Following that, they must evaluate from a sentencing point of view that he has committed one of the aggravating factors that are listed in the military commissions manual, unanimously. And then they must unanimously agree on the sentence. Following that, Judge Crawford will again review the case file, as I mentioned before, tremendously helpful rights of the accused to determine if she agrees that the death penalty is the appropriate penalty.

Then the case goes through the Court of Military Commission Review, the D.C. Court of Appeals and potentially to the Supreme Court. So we are a long way from determining the details of the death penalty, and when that time comes, if it should ever come at all, we will follow the law at that time and the procedures that are in place at that time.

As to your other question, with regard to the classified evidence, the rule is that the accused will get to see every piece of evidence that goes to the finder of fact, every piece of evidence that goes to the finder of fact.

Q One last procedural one. Could I follow up on Jim's question about appeals?

GEN. HARTMANN: Yeah, sure.

Q There are procedures in the military -- in the law that allows some appeal to go to the civilian court, the D.C Court of Appeals. Can you define what gets to go to them, and if a finding of guilt is able to be appealed eventually to civilian courts?

Or is that only through the military courts?

GEN. HARTMANN: Right.

In this process, they all go through the Court of Military Commission Review first, and then to the D.C. Court of Appeals.

Q So there is an eventual possible appeal to the civilian courts.

GEN. HARTMANN: Yes, absolutely, absolutely.

Q To what extent did the White House Office of Legal Counsel review any of these charges before this morning? Did they suggest any tinkering? And did they suggest capital --

GEN. HARTMANN: They reviewed it not at all and made none of those suggestions, because they reviewed it not at all.

Q One of the problems in the previous commission hearings down at Guantanamo is that some of the defendants did not have the right to call their own witnesses. Are you saying it will be different in these cases, and that if they call witnesses from overseas, for example, does that mean the U.S. government will the pick them up, pay for them and bring them to the court? How does that work?

GEN. HARTMANN: They have the right to call witnesses, including expert witnesses. To the extent that they're available at Guantanamo, it's a little easier. To the extent that they're somewhere else in the world, we would, subject to the judge's direction, make the appropriate effort to obtain them, to the extent that they're available.

Those are factors that apply. Also the judge has to decide if they're material and relevant to the case. So the judge will make a determination, once the case begins, as to whether a witness is material, relevant and whether the witness should be available. Or the witness can be made available by remote means, by deposition, by video, by phone.

Q So it's conceivable that one of these defendants could call Osama bin Laden as a witness.

GEN. HARTMANN: I suppose. It's conceivable.

Q General, along those lines, has there been any thought about charging Osama bin Laden at military commission, even though he is not in custody?

GEN. HARTMANN: Not that I'm aware of.

Q General, you have spent a lot of time describing the rights that are available in Guantanamo. And much of what you've described parallels the American civilian system, and you've made that point.

This morning, obviously this case is going to be scrutinized all over the world. What is your explanation of why the United States is charging these people in a military system, rather than in the American civilian system?

GEN. HARTMANN: Fundamentally it's because the president of the United States and the Congress of the United States created the Military Commission Act and determined that that was the appropriate place to proceed with these people.

The military commissions are not unique to this process. They existed under General George Washington, under General Andrew Jackson, Winfield Scott. They were used following the Lincoln assassination for the conspirators of the Lincoln assassination, and they were used extensively following World War II.

These processes that we have before the military commissions in many ways parallel the military justice system which, I think, is very well regarded by the defense community as giving tremendous rights to defense. In our case, we have to make some adjustments for national security, for pretrial rights, speedy trial and so forth, because of the nature of the global war on terror, which has extended for some time and is continuing.

So that's why there have been some adjustments in this system that are slightly different from the military system. And the president and the Congress worked together to create the Military Commission Act, and that's why we're bringing these cases today for military commission.

MR. WHITMAN: We've got time for maybe one or two more.

Q Can you tell us the background of the members of the commission? Have any been a part of this process before? Have they done any ARBs and have they done CSRTs? Where are they coming from?

And I think you mentioned that it takes a unanimous 12 votes for the death penalty to be confirmed. Is there a time in between the commission judgment and the impaneling of the sentencing panel?

GEN. HARTMANN: No, the panel has not been -- Judge Crawford would refer the case to a particular panel at the time she makes a referral decision. So those people have not been designated yet, and they haven't gotten the case. But she chooses them based upon their age, education, experience, training and judicial temperament, after reviewing their records.

I didn't catch the second question.

Q I think you said there was a 12-person panel that carries out the sentence or confirms the sentence.

GEN. HARTMANN: There's a 12-person panel that we would -- in the civilian world you'd call a jury.

Q So they are the ones that in turn confirm the death penalty.

GEN. HARTMANN: They're the ones that will make the sentencing decision. They are the sentencing authority in the first case, and then it is reviewed by Judge Crawford and subject to appeal, et cetera. But they are the ones, just like in any other jury, that make the sentencing decision.

Q And what is their make-up?

GEN. HARTMANN: We -- it'll be the same as the --

Q What available pool do they come from?

GEN. HARTMANN: They are appointed -- they are nominated by the services. They are -- there's a large pool of officers nominated by the services, and that's the pool that we draw from.

Q Why did you decide to try this group together? And why are you doing it right now?

GEN. HARTMANN: The decision to try them together or the recommendation to try them together was made by the chief prosecutor, and he would have evaluated the commonality of fact, evidence, charging, the fairness and the administrative burdens of trying the cases separately and the impact on the victims, among many factors. I don't know specifically what factors he used. And we're trying them now because the prosecution has sworn the case and believes

it's ready to proceed to trial.

Q Will there be television cameras permitted inside the hearing room during this? Will it be made that public?

GEN. HARTMANN: It will not be -- there will not be television cameras in this military commission process. There are -- in the military process and in federal courts, there is no provision for televising of proceedings, so we will not televise the proceedings.

Q Will 9/11 families be able to listen to the proceedings, or --

GEN. HARTMANN: We expect -- and we're working on process whereby we would -- consistent with the Moussaoui practice, which was an extraordinary practice, to bring some video back to the families, so that they can view that in a safe environment.

Q JAG -- (inaudible) --

MR. WHITMAN: All right. We've got to bring it to an end now. Thank you, though.

LOAD-DATE: February 12, 2008

Attachment H

[redacted]

From: [redacted]
Sent: Tuesday, January 29, 2008 10:42 AM
To: [redacted]
Subject: FW: 9-11 Draft Charges -25 JAN.doc
Attachments: 9-11 Draft Charges -25 JAN.doc

electronic copy of charge sheet.

From: [redacted]
Sent: Monday, January 28, 2008 3:58 PM
To: [redacted]
Subject: FW: 9-11 Draft Charges -25 JAN.doc

As requested

From: [redacted]
Sent: Monday, January 28, 2008 1:59 PM
To: [redacted]
Subject: 9-11 Draft Charges -25 JAN.doc

<<...>>

Attachment I

1 of 1 DOCUMENT

SHOW: Day to Day 4:00 PM EST

February 22, 2008 Friday

LENGTH: 2188 words

HEADLINE: A Twist in the Case Against Bin Laden's Driver

ANCHORS: MADELEINE BRAND, ALEX CHADWICK

BODY:

MADELEINE BRAND, host:

From the studios of NPR West, this is DAY TO DAY. I'm Madeleine Brand.

ALEX CHADWICK, host:

I'm Alex Chadwick.

Coming up, in a state that hasn't executed a prisoner in almost 70 years, how do you build an execution chamber?

BRAND: But first, a stunning turn of events at Guantanamo. The former chief prosecutor there has decided to testify on behalf of one of the defendants, Salim Ahmed Hamdan - that's Osama bin Laden's former driver.

Air Force Colonel Morris Davis joins me now. Welcome back to DAY TO DAY.

Colonel MORRIS DAVIS (United States Air Force): Oh, thank you for having me.

BRAND: Well, you resigned as chief prosecutor last fall, and you have said you think the prosecution of the Guantanamo prisoners is flawed because it has become politicized. Why did you decide to go another step and actually testify on behalf of one of the defendants, Hamdan?

Colonel DAVIS: What I've agreed to do is to tell the truth, which I've offered to do a number of times. And it seems that some folks are violently opposed to me telling the truth. So whether it's for the prosecution, defense, or before a congressional hearing, I intend to tell the truth.

BRAND: What is that truth?

Colonel DAVIS: The truth is that Congress gave us what I view is a very fair piece of legislation - the Military Commissions Act - that gives us the ability to have full, fair and open trials. But you have some political appointees who just frankly don't trust people in uniform. They view that, you know, if you wear a uniform obviously you must be not that bright or you'd be out in the real world making real money, and so they have to control the process. And that's where I think this political influence in the process is taking justice out of the military justice system.

BRAND: And specifically what do you mean by political interference?

Colonel DAVIS: Well, I think - as you probably know, Jim Haynes is the DOD general counsel. When I first took the job as chief prosecutor, the general counsel didn't have a formal role in the chain of command over the prosecution. But that changed in October - last fall - the day I resigned was the day that Deputy Secretary of Defense Gordon England signed a memorandum that placed the general counsel in a command position above me.

If you followed Mr. Haynes, the general counsel, you know that he was one of the architects of the, you know, what became known as the Torture Policy and the Torture Memorandum that said waterboarding is a lawful technique to use on the detainees, which I wholeheartedly disagree with. And also when I had my interview for the chief prosecutor job, that's where he made the statement that we can't have acquittals, we've got to have convictions.

You know, at the time that was just his opinion, but in October of last year he, you know, went into a - where he had command authority over the prosecution, a person who said we can't have acquittals and waterboarding's okay. And that's when I decided it was time to quit.

BRAND: When he said we can't have acquittals, we've got to have convictions, couldn't that be interpreted as something along the lines of just rallying the troops, rallying the prosecutors to prosecute these cases vigorously?

Colonel DAVIS: Yeah, it could. And that's the way I took it. At the time the statement was made, as I said, Mr. Haynes in the general counsel's office did not have a formal place in the chain of command over the prosecution. But as I said, in October, you know, he had a - then had a formal role, a command position, over the prosecution, where he can - his opinions are no longer opinions, they're orders.

BRAND: So you're going to testify for the defense - for Hamdan's defense. What exactly will you testify to?

Colonel DAVIS: Something I've made clear to the defense is, you know, I'm more than happy to talk about my views of where I think the process has gotten off the tracks and it's no longer going to be a full, fair and open trial. But my concerns about the process certainly don't translate into a view that their clients are innocent or they should be excused for their conduct.

I mean, if you take Mr. Hamdan, for instance, he was captured with two surface-to-air missiles in his car. And in Afghanistan at that time the only thing flying were geese and us. So I have no sympathy for Mr. Hamdan, but I do think he's entitled to a fair trial that's free of political influence.

BRAND: What do you think about the 80 or so men who are going to face these trials? Do you think that they will - each one of them will not get a fair trial?

Colonel DAVIS: Well, I think that - as I said, I think the folks in uniform - the judges, the counsel, and the members that'll sit on the jury - I think you'll find that they're going to think for themselves. So I think the uniform folks are going to do their best to do justice.

But my concern is you have some political appointees that, you know, have a vested interest in trying to make sure that we achieve a certain outcome. And in my view they need to be removed from this process. It's a military commission. The military ought to be running it, not political appointees.

BRAND: You were forbidden to testify before Senator Feinstein's committee. Yet you have been free by the military to speak to the media about this. Why do you think that is?

Colonel DAVIS: Well, I think the characterization of free to speak by the military - I think by and large, you know, the folks in uniform I don't think have a problem with what I'm saying. There are a few folks - a few political appointees I think are probably extremely upset with what I'm saying. I think the military as a whole I think is concerned about,

you know, doing justice and doing what's right and upholding American values and not trying to rig a system.

So I think there are a couple of people who are probably real upset, but they don't have command authority over me and the folks who do have told me that as long as I tell the truth and I'm not breaking the law that I can say what I feel like I need to say.

BRAND: What do you think of the Bush administration's announcement that it will prosecute six men - six of the worst of the worst, they call them - for the 9/11 terrorist attacks, including Khalid Sheikh Mohammed?

Colonel DAVIS: Mm-hmm. Well, I'm not surprised. As I've stated before, there is some impetus to get these cases moving and to get some momentum. There was a fear that if some progress wasn't made, that this whole process was going to implode. And you know, this administration's coming to an end. There will be a new administration coming in less than a year, and if you couldn't get this thing up and running that it was just going to collapse of its own weight.

And certainly getting some cases into the system, and particularly cases like Khalid Sheikh Mohammed, and energizing the families of the victims of 9/11 and getting them, you know, energized and engaged in this process will - I think the view is that'll get some momentum behind this and make it hard to stop.

BRAND: So it sounds like you don't think these six men will receive a fair trial.

Colonel DAVIS: Well, I have serious concerns. I mean, my commitment was to conduct full, fair and open trials, and I think we may go 0 for 3 on full, fair and open.

BRAND: Well, Colonel Davis, thank you very much for speaking with me again.

Colonel DAVIS: It's my pleasure. Thank you for having me.

BRAND: Colonel Morris Davis is director of the Air Force Judiciary, and we've been speaking to him about his decision to testify on behalf of one of the Guantanamo Bay prisoners, Salim Ahmed Hamdan.

Joining me now is one of the men Morris Davis complains is politicizing the process. He is Brigadier General Thomas Hartmann. He's the legal advisor to the convening authority of the Office of Military Commissions at the Pentagon, and that's the office that overseas the legal proceedings at Guantanamo.

Colonel Morris Davis is complaining that the process at Guantanamo to try these defendants, to try the prisoners there, is hopelessly politically tainted. What do you say to that?

Brigadier General THOMAS HARTMANN (Office of Military Commissions): I say that he's wrong. The process is in so many ways the essence of American justice. The protections for the accused are frankly protections that exceed those that were available at Nuremburg, those that are available in the more recent times in connection with other international tribunals.

We give them - the accused - in these cases virtually the same rights that we give our soldiers, sailor, airmen, and marines with slight adjustments. That's quite an indication of the strength of the American judicial system and our willingness to make these trials fair and just.

BRAND: Well, he's saying they are not fair and just because you'll be using evidence gathered during waterboarding, which he considers torture and should not be admissible. He says they're not going to be open in terms of classified material not being shared with the defense. And that they won't be free, in essence.

Brigadier General HARTMANN: Well, Colonel Davis was part of the process for two years. In that two year period he was able to get two cases sworn and charged. In the period of time since he's left - just four months - we've charged 10 new cases. The trials will be fair. We've had more than 120 members of the press down there to

Guantanamo Bay to witness this. We've had the United Nations observers. We've had non-governmental organizations - the ACLU, the Human Rights Watch, Human Rights First - and if anybody should know the rules of evidence and the rules of procedure, Colonel Davis should know them. They are extremely broad, extremely generous, and they in many ways match the military justice system that we've had for more than 50 years in place and are quite similar to the Article 3 courts in the United States. And they are far in excess of the rights in terms of evidence, openness, that are available in other international tribunals.

BRAND: Now, Colonel Davis is also accusing the Pentagon general counsel, William Haynes, of pushing for convictions, despite any perhaps contradicting evidence, saying, quote, "We can't have acquittals, we've got to have convictions."

Brigadier General HARTMANN: Well, any prosecutor - and Colonel Davis was the chief prosecutor - so the chief prosecutor's duty is to bring justice. But the chief prosecutor's focus is on getting evidence together to achieve a beyond a reasonable doubt standard. So a prosecutor strives for convictions within the system achieving justice. However, he can anticipate some acquittals if he's trying hard cases. If you have a prosecutor who hasn't had an acquittal, he has never tried a hard case.

BRAND: do you think that any evidence gathered during the process of waterboarding should be admitted?

Brigadier General HARTMANN: What I think is what I will say - and Colonel Davis was a part of this for the two years - and that was setting up the military commissions. The military commissions very much match the Uniform Code of Military Justice system we have. They have a uniformed defense counsel and several defense counsel in addition to uniformed people. They have the prosecutors and they have a judge.

Those issues will be decided in the courtroom, and very consistent, very consistent with the American system of justice, where evidence is presented by the prosecution, challenged by the defense, cross-examination, confrontation, witnesses in front of the judge, and the judge makes a decision with finality. That's the American system of justice.

That's the system we have with these military commissions, with the military court-martial process, with the Article 3 courts in the United States that we see every day. There's nothing different about that. It's the standard of justice and it's an honorable system of justice. We should all be very proud of that system.

BRAND: And so there is no political interference, as far you're concerned?

Brigadier General HARTMANN: Not only as far as I'm concerned, absolutely not. I've been in this job seven months, and as I said, Colonel Davis was able to bring three cases to trial in two years and in seven months - and in the last four months since Colonel Davis has been gone we have moved 10 cases. That's not from political pressure. There is none. It's from me insisting that we move the process.

BRAND: What do you think of his decision to testify on behalf of Mr. Hamdan?

Brigadier General HARTMANN: He's certainly free to testify on behalf of anyone he wants to. That's the American system of justice. If the defense needs a witness - in this case it's another indication of the rights in this case - the defense can call anyone that's material and relevant to the case. And Colonel Davis is one of those people that they think that is material and relevant to their case. So if the judge concurs and that's the way it goes, then we're happy to listen to Colonel Davis in the courtroom.

BRAND: That's Brigadier General Thomas Hartmann. He is the legal advisor to the Office of Military Commissions. That office oversees the legal proceedings at Guantanamo Bay.

LOAD-DATE: February 22, 2008

Attachment J

Los Angeles Times

http://www.latimes.com/news/opinion/commentary/la-oew-hartmann19dec19,0,5821562.story?coll=la-home-commentary
From the Los Angeles Times

BLOWBACK

There will be no secret trials

A Defense Department legal advisor responds to his subordinate's resignation.

By Thomas W. Hartmann

December 19, 2007

I have read with great disappointment the Op-Ed article by Morris D. Davis, former chief prosecutor for the Office of Military Commissions, particularly his comments with regard to Susan Crawford, the military commissions convening authority.

Since October, Davis has repeatedly complained about the very military commissions he oversaw for two years. He has criticized the commission process for moving too slowly, resulting in only one case being tried, by a guilty plea. After that plea was negotiated, with Davis' written concurrence, he claimed publicly that he was not properly consulted.

Davis has recently protested that politics has been inserted into the process, which he in many ways controlled, alleging improper pressure from me, from the department's general counsel, Jim Haynes, and now from Crawford. Specifically, Davis insinuates that she is politically motivated and that she lacks impartiality. He claims — though that he never breathed a word of this to me — that the pressure to move cases more rapidly was politically motivated.

But one should be careful when one challenges the reputation of others. Crawford has not directed or influenced the way any military commission case will be tried. Davis knows that I, without any political interference, directed him to evaluate more carefully the evidence, the cases, the charging process, the materiality of the cases, the speed of charging, the training program and the overall case preparation in the prosecution office. Interestingly, when I testified before Sen. Jeff Sessions (R-Ala.) that some cases are moved more quickly than others because they have the most material evidence, he commented: "Well, I think it's almost prosecutorial incompetence not to think in those terms. It's important that you do so."

Davis further contends that he resigned within hours of learning that I would report to General Counsel Haynes, and as my subordinate, Davis would be under Haynes in the chain of authority. This was also just hours after he learned the results of an independent military panel — appointed by Haynes after consultation with the service Judge Advocates General — that concluded I had not improperly asserted my authority. That report was immediately made available to the public. It is worthy of note that Haynes had, months before, signed a performance evaluation on Davis, suggesting that Davis was already in the chain of command. Davis did not object then.

Davis also charges that the commissions are no longer "full, fair, and open trials." This is particularly biting as he knows that the process offers unprecedented rights to alleged war criminals. Indeed, he wrote and spoke of that often. He also knows how much effort the prosecution and defense teams have dedicated to the fairness of the process — a process played out in United States vs. Hamdan.

Regarding his new allegations that the trials are not open, Davis knows that national security demands that certain evidence remain classified. He had an especially high security clearance for that very reason. But there will be no "secret" trials. Though we must safeguard classified information in order to protect ongoing operations and our soldiers, sailors, airmen and marines, not one piece of evidence will go to a commission jury without review and the opportunity to object by the accused and his counsel.

Military commissions are now moving forward fairly and transparently. As they continue, critics will see uniformed service members, including judges, prosecutors and defense counsel, conduct trials with the dignity, fairness, and respect for law that defines American military justice — a justice system that remains the envy of the world.

Air Force Brig. Gen. Thomas W. Hartmann is a legal advisor to the Department of Defense Office of Military Commissions.

Attachment K

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

LEGAL ADVISOR

1 February 2008

MEMORANDUM FOR Chief Defense Counsel, Office of Military Commissions

SUBJECT: Inadvertent Disclosure of Attorney-Client Privileged Work Product

1. On January 29, 2008 the OMC Director of Operations, COL Wendy Kelly (the "DO"), erroneously sent the Deputy Chief Defense Counsel, Mr. Michael Berrigan (the "Deputy"), an email with an attachment that included attorney-client privileged work product. The subject line of the email also identified the attachment in a way that might have advised the Deputy of the sending error. The Deputy immediately notified the DO that he had received the email both by voicemail message and email. The email specifically asked, "Did you intend to send me this document?" I applaud this proactive step that indicated sensitivity to the potential of an inadvertent disclosure and the issues it might raise. The DO replied by voicemail and email that the transmission was an error, that it was attorney-client work product, and that it was not intended for the Deputy. The Deputy has advised that he has discussed the matter with you, and has forwarded it to his state bar. On January 30, 2008 the Deputy also sent an email to the DO indicating that he clearly understood that the disclosure was a "mistake." This letter constitutes a formal demand for the return of the document and deletion from any electronic format.

2. In light of this improper and inadvertent disclosure, we have reviewed some of the applicable professional responsibility rules. ABA Model Rule 4.4 (b) states that, "A lawyer who receives a document relating to the representation of the lawyer's client and who knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Model Rule 4.4 Comment [3] goes on to state that, "[T]he decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer." Of course, the rule is not precisely on point because the Deputy has no client. The Army, Navy, and Marine Corps professional responsibility offices indicated that, under these circumstances, any counsel, uniformed or civilian, who works for that service must inform the sender of the inadvertent disclosure and promptly return the document without providing it to anyone else.

3. We are uncertain of the states in which the Deputy is licensed, but I am advised that the majority of state professional responsibility rules follow a similar pattern. Some state bars do not specifically require the receiving counsel to return the privileged material. The rationale for those states is that the receiving counsel also has an ethical obligation to act in the best interests of his client. In this case,

the Deputy serves in a supervisory attorney capacity and does not represent clients. To my knowledge, he does not have an attorney-client relationship with any of the individuals mentioned in the privileged materials. Therefore, returning the privileged materials presents no conflict with any duty to represent a client. In this instance and in light of the previously cited service rules and basic professional responsibility, I believe that the clearest ethical guidance is that the Deputy should return the document and not use it in any fashion. I can think of no circumstances in which the document could properly be shared with any other person.

4. I am happy to discuss this matter further.

THOMAS W. HARTMANN
Brigadier General, USAF
Legal Advisor to the Convening Authority

cf: OSD-DGC, PHP (Mr. Koffsky)
OSD-DGC, LC (Mr. Castle)

[redacted]

Attachment L

TITLE	# The Great Guantánamo Puppet Theater
DEPARTMENT	No Comment
BY	Scott Horton
PUBLISHED	February 21, 2008

Last week the Department of Defense launched a major media offensive. It announced that trials of six "high-value detainees" linked to the attacks on 9/11 would be charged in proceedings before the Guantánamo military commissions this spring. Specific accusations concerning the roles played by each of the six in the tragedy of 9/11 were all over the media. For the most part, the media has only lightly embroidered the Pentagon's script. The *Washington Post* told us about the "clean team" that the Pentagon had sent in, top-notch no-nonsense prosecutors to do the job. PBS's NewsHour gave an extended segment over to the Pentagon's key spokesman on the issue, Brigadier General Thomas Hartmann, to set out the case for the proceedings.

Curiously, this ran side-by-side with a series of public presentations by leading figures of the Administration—Attorney General Mukasey, Steven Bradbury (acting head of Justice's Office of Legal Counsel), Director of National Intelligence Michael McConnell and even President Bush himself—shoring up the Administration's barely comprehensible position on waterboarding and other coercive interrogation techniques. The overlap was not coincidental, because the two projects were closely intertwined. The Administration took the position that it doesn't presently authorize waterboarding, but now acknowledges that it did in the past and reserves that it might again in the future. It argues that there's nothing wrong with waterboarding, and that any waterboarding done in the past was done lawfully. Why not just say that waterboarding is "torture"? There's one immediate reason: doing so would exclude a mass of evidence that appears to be available for the pending

prosecutions.

But while the American mainstream media presented the story with the main spotlight on the Pentagon and its announcements and some trivial sideshows in which bickering lawyers raised quibbles about vexatious technicalities like the hearsay rule, access to exculpatory evidence and the ever-present torture, overseas the Guantánamo proceedings got a different treatment. Outside of the United States, "Guantánamo" is a by-word for torture, authoritarian abuse and injustice. And the fact that the U.S. had elected to put these six detainees on trial before a military commission in Guantánamo drew a predictable review. "There will not be six persons on trial, but seven," editorialized the predictably pro-American German newspaper *Die Zeit*. The seventh, of course, is the Bush Administration and its hopelessly corrupted concept of justice.

The American media seems by-and-large not to understand the "justice" angle of the military commissions debate. They instantly want to run into the weeds with extended discussions of evidentiary issues, and they miss the glaring question that hangs over the entire affair. And now a week into the process, the proposed trials have taken a strange twist. Will the American media at last recognize that the real questions about this process go to the fundamental *independence* of the courts? Dramatic disclosures in an article published yesterday in *The Nation* require them to take a close look at it. So far, they don't seem to be willing to do so. Here's the core of Ross Tuttle's dramatic piece:

According to Col. Morris Davis, former chief prosecutor for Guantánamo's military commissions, the process has been manipulated by Administration appointees in an attempt to foreclose the possibility of acquittal. Colonel Davis's criticism of the commissions has been escalating since he resigned this past October, telling the Washington Post that he had been pressured by politically appointed senior defense officials to pursue cases deemed "sexy" and of "high-interest" (such as the 9/11 cases now being pursued) in the run-up to the 2008 elections. Davis, once a staunch defender of the commissions process, elaborated on his reasons in a December 10, 2007, Los Angeles Times op-ed. "I concluded that full, fair and open trials were not possible under the current system," he wrote. "I felt that the system had become deeply politicized and that I could no longer do my job effectively."

Then, in an interview with The Nation in February after the six Guantánamo detainees were charged, Davis offered the most damning evidence of the military commissions' bias–a revelation that speaks to fundamental flaws in the Bush Administration's conduct of statecraft: its contempt for the rule of law and its pursuit of political objectives above all else. When asked if he thought the men at Guantánamo could receive a fair trial, Davis provided the following account of an August 2005 meeting he had with Pentagon general counsel William Haynes–the man who now oversees the tribunal process for the Defense Department. "[Haynes] said these trials will be the Nuremberg of our time," recalled Davis, referring to the Nazi tribunals in 1945, considered the model of procedural rights in the prosecution of war crimes. In response, Davis said he noted that at Nuremberg there had been some acquittals, something that had lent great credibility to the proceedings.

"I said to him that if we come up short and there are some acquittals in our cases, it will at least validate the process," Davis continued. "At which point, [Haynes's] eyes got wide and he said, 'Wait a minute, we can't have acquittals. If we've been holding these guys for so long, how can we explain letting them get off? We can't have acquittals, we've got to have convictions.'"

Davis submitted his resignation on October 4, 2007, just hours after he was informed that Haynes had been put above him in the commissions' chain of command. "Everyone has opinions," Davis says. "But when he was put above me, his opinions became orders."

Colonel Davis is not just any JAG officer. He was an up-and-comer widely viewed in his peer group as someone in line for a star, and ultimately perhaps, to be the Air Force's Judge Advocate General. He is also no whining civil libertarian, but rather a no-nonsense conservative, whose prior scraps with civilians in the Pentagon came over the restraints they put on his ability to charge forward and prosecute cases.

In particular, Davis and other Guantánamo prosecutors were crest-fallen over the handling of the case of David Hicks. An Australian sheepskinner turned Middle East adventurer, Hicks was labeled one of the "worst of the worst" and was charged with being a weapons-toting terrorist. Just as his trial got under way, and Davis confidently delivered a searing opening promising to make Hicks out as a bloodthirsty figure who had betrayed his homeland and turned to a path of "Islamic" violence, the public learned that a plea-bargain had been reached. Curiously however, all this transpired without involving the prosecutors.

You might well wonder how that was possible. And indeed, that is the very nub of the current accusations over the rigging of the commissions, because the handling of the Hicks case quite dramatically supports Colonel Davis's charges. Over the next several weeks, the details of the Hicks plea bargain—which led very quickly to a minimal sentence for Hicks, his transfer to Australia, and his release—trickled out. Apparently the Hicks case turned on one single issue: politics. Indeed, electoral politics.

Australian Prime Minister John Howard was facing a difficult election campaign. The imprisonment of David Hicks was figuring as a terrible issue for him and his Liberal Party. Public opinion has swung against his government, as people, led by the legal community, questioned how an Australian citizen could be abandoned to the perils of Guantánamo—when the U.K. and other nations had fetched their nationals home. Vice President Dick Cheney visited Howard, discussed the Hicks case, and returned home. Within a short period, a Cheney protégée, particularly close to Cheney's chief of staff David Addington, Susan J. Crawford, was installed as the convening authority for the Military Commissions, and Ms. Crawford's legal advisor quickly negotiated a plea bargain with Hicks's attorneys. Later it was learned that Jim Haynes, known for his tight connections with the Vice President's office, had played a key role as intermediary in the affair.

The Australian public welcomed the release of David Hicks, but the manipulation of his case produced a significant scandal. It was, as several Australian papers charged, the impermissible manipulation of legal proceedings through a political process and for political reasons–which many speculated is about all the Guantánamo process had been from the outset. John Howard and his Liberal Party were humiliated at the polls, and in an astonishing embarrassment, voters in Howard's own constituency decided to retire him from political life. But American media reacted to the entire affair with a collective yawn.

So the first high profile military commissions case ran its full course. And it turned on nothing *except* politics. Not a good sign for the future.

But as foreign media were regularly observing, there was something extremely fishy about these "military" commissions. In fact one of the major insights critics offered up was that they *were not really "military" at all.* They had the appearance of being "military," because

the courtroom scene on which all the cameras focused were filled with men and women in uniform. But as the Hicks case showed, the military actors were all like so many marionettes. Behind the scenes, the puppet masters were pulling the strings. And the puppet masters were suspiciously partisan political figures. Two were points of focus. The first is Susan J. Crawford, who served as convening authority. In the military justice system the convening authority is a uniformed military commander whose command responsibility covers the territory or subject matter of the legal proceedings. He is the "convening authority" because the military justice process is seen as an extension of his command authority. Under the doctrine of *Yamashita*, military commanders have a specific responsibility to implement the laws of armed conflict, and they may in fact bear liability if they fail in this duty.

But unlike her predecessor, Major General John D. Altenburg, Susan J. Crawford is a convening authority who has never worn a uniform nor held a military command. She is a civilian. Indeed, her principal qualification for the position appears to be her political proximity to Vice President Cheney, and specifically to his legal policy guru, David Addington. In fact at an event held last year to mark Crawford's retirement as a military appeals judge, she went out of her way to note the presence of and thank just one person, her friend David Addington.

Given this tight relationship, it then emerges as no surprise that Crawford and her office are so receptive to the concerns of Vice President Cheney's office and so prepared to allow another Addington crony, Jim Haynes, to dictate the terms of the proceedings.

But, unseemly as this situation was already, it actually got much worse following the Hicks case. Apparently judging the military commissions process as a matter of tight personal concern, Jim Haynes decided he needed to have tighter and more direct control over them. He then proposed a change in the command structure for the participants. They were to be subordinated directly to his command.

Haynes crafted and secured Deputy Secretary of Defense Gordon England's signature on two documents. The first, which can be examined here, directs that Brigadier General Thomas Hartmann, Legal Advisor to the convening authority and the person who

effectively manages her office, reports to Paul Ney, DOD Deputy General Counsel (Legal Counsel), who, of course, in turn, reports to Jim Haynes.

The second memorandum, which can be examined here directs that Colonel Morris Davis, the Chief Prosecutor, reports to Brigadier General Hartmann, who reports to Ney, who reports to Haynes. This memorandum was particularly necessary as an after-the-fact adjustment to cover Haynes's manipulation of the Hicks case, establishing a chain-of-command justification for his intervention to direct the plea bargain resolution of the case.

Same relationship exists for the Chief Defense Counsel, who reports to Paul Koffsky, DOD Deputy General Counsel (Personnel & Health Policy) who, like Ney, reports to Haynes.

The cumulative effect of these changes masterminded by Haynes is plain enough: the already very obvious threads attached to the commission participants were replaced with some crude hemp rope. It was obvious to all observers who was calling the shots. And it was plainly illegal and unethical. Professional rules require the defense counsel, prosecutor, and judges to exercise independent professional judgment. Moreover, the Military Commissions Act of 2006 guarantees the professional independence of these actors in the process. The command structure crafted by Haynes was plainly designed to achieve the political subordination of the JAGs, defying the MCA's guarantee of independence.

Davis resigned because he felt the commissions system was rigged. He also filed a formal complaint over the improper role played by the convening authority's legal advisor in the Hicks case. That complaint is in the process of investigation by the Department of Defense. Here is a memorandum posted to the Department of Defense's website concerning the still pending investigation and the issues raised. Note that while Davis was not in a position to premise the complaint on Haynes's involvement, that is the 800 pound gorilla in the room. But Davis was not the only, nor even the first prosecutor to resign. Three others–Maj. Robert Preston, Capt. John Carr and Capt. Carrie Wolf–asked to be relieved of duties after saying they were concerned that the process was rigged. One said he had been assured he didn't need to worry about building a proper case; convictions were assured.

Of course, the number of *defense* counsel claiming that the system is stacked against them is legion. I surveyed the views of the defense lawyers, and the serious mistreatment they frequently faced at the hands of the Rumsfeld Pentagon, in this article.

Even the chief judge at Guantánamo, Colonel Ralph Kohlmann is plainly troubled by the military commissions arrangement. He wrote in a paper published in 2002 that "even a good military tribunal is a bad idea." Col. Kohlmann argued that the "apparent lack of independence" of military judges would present "credibility problems." Col. Kohlmann wrote these words *before* the obvious political manipulation of the Hicks case and *before* Haynes's jiggered the command structure to place himself in control of the entire process. The "apparent lack of independence" of which he wrote has ballooned into a nightmarish reality.

Brigadier General Hartmann is a focal figure in all of this. His "independent judgment" has been dramatically displayed in his testimony before a Senate Committee. He was asked a few questions about waterboarding and torture, and the answers he gave were strictly those of his puppet master. A number of senators, from both parties, expressed their disgust with his stooge-like behavior. Moreover, Hartmann has now made the media rounds dramatizing the trials, denouncing the defendants as terrorist murderers who are finally seeing a glimpse of justice. Now, they may well be terrorist murderers who deserve to be prosecuted and receive severe sentences–but it is highly inappropriate for Hartmann to be making such statements. As legal adviser to the convening authority, any decisions in the case will be referred to him. And he has now publicly prejudged the cases, disqualifying himself under applicable ethical rules from playing the role which has been delegated to him. Even more to the point, the fact that a person who serves as a sort of appellate authority would be involved in media spectacles designed to demonstrate the importance of the case against the accused reflects very poorly on the entire process, and will undermine public confidence in any result that it produces.

Hartmann was quick to invoke the model of the Nuremberg trials, calling these proceedings a "modern Nuremberg." In fact, the Nuremberg process is worthy of emulation and had the Bush Administration turned to its grand design, or even some of the

other model international tribunals, most of the embarrassment that now surrounds the Gitmo moral swamp would have been avoided. Robert H. Jackson, arguably America's greatest attorney general, was responsible for structuring those proceedings. He made clear throughout that he was guided by two concerns. The first was to do justice. And the second was to be damned sure that the public recognized that justice was being done. He accomplished both goals, and the result was a landmark international law and a point of pride for America.

But the military commissions crafted by the Bush Administration are an embarrassing stain compared to Nuremberg. One of the main reasons is that they have been crafted by political hacks out on a partisan agenda, and the experts who could have done a credible job–first among them the military lawyers in the JAG corps–have been ignored or overruled at each turn. The ability of defense counsel to conduct a meaningful defense has been impeded, with gains coming grudgingly only after the Supreme Court overturned the first, colossally incompetent structure in *Rasul*. Most menacingly, the specter of torture hovers over the current military commissions proceedings, with the acknowledgement that many of the defendants were subjected to techniques which the entire world (excluding only the Bush Administration) considers to be torture.

Even most critics concede the professionalism and integrity of the military lawyers who are assigned to the military commissions system as judges, prosecutors and defense counsel. Their professionalism and integrity are not an issue, or more precisely, protecting their professionalism and integrity from political predators *is* the issue. Critical attention focuses today just where it did at the outset: on the political hacks who have shamelessly attempted to manipulate the system, and whose misconduct is bringing shame and opprobrium upon the United States. Colonel Davis's description of his conversation with Haynes comes as a surprise to no one who has been tracking this issue. To the contrary, it is a bit of the well-understood reality of the situation bubbling to the surface.

[redacted]

Sent: Friday, March 28, 2008 10:17 AM

To: Prasow, Andrea, Ms, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC; [redacted] John, Mr, DoD OGC

Cc: Berrigan, Michael, Mr, DoD OGC; [redacted]; 'McMillan, Joseph M. (Perkins Coie)'; Morris, Lawrence, COL, DoD OGC; 'Murphy, John'; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC; [redacted] OGC; Jackson, Tracy, MSgt, DoD OGC; Chavis, Bobby, SSG, DoD OGC; Pagel, Bruce, COL, DoD OGC

Subject: Filing Designation: D-026 Motion to Dismiss for Unlawful Influence - U.S. v. Hamdan

All parties,

The filing designation for the 27 March 08 Defense Motion to Dismiss for Unlawful Influence is D-026 Motion to Dismiss for Unlawful Influence - Hamdan. All future communications - whether in hard copy or by email - concerning this motion will use the filing designation as a reference in addition to the name of the filing. See RC 5.3:

3. Filing designation and future communications or filings.

a. Once a filing designation has been assigned, all future communications - whether in hard copy or by email - concerning that series of filings will use the filing designation as a reference in addition to the name of the filing. This includes adding the initial file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments. Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: "P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith." The filename of the filings shall be the same as the response being sent.

* The filename of a document that is an attachment to the response should read: "P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr Smith."

v/r,

LTC [redacted], USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From: Mizer, Brian, LCDR, DoD OGC
Sent: Thursday, March 27, 2008 14:27
To: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Charles Swift; [redacted]C; David, Steven, COL, DoD OGC; [redacted]; Harry Schneider; Joseph McMillan; Keith Allred; [redacted], LN1, DoD OGC; Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD

OGC; [redacted]
Cc: [redacted]
Subject: U.S. v. Hamdan - Defense Motion to Dismiss for Unlawful Influence

[redacted]

Please find attached for filing in the case of *United States v. Hamdan* the Defense Motion to Dismiss for Unlawful Influence. The PDF version is signed and includes attachments; the Word version is unsigned and does not include attachments.

Very Respectfully submitted,

LCDR Mizer

B. L. MIZER
LCDR, JAGC, USN
Defense Counsel
Office of Military Commissions
[redacted]
<<...>>

[redacted]

From: [redacted]
Sent: Friday, March 28, 2008 3:20 PM
To: Britt, William, LTC, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Mizer, Brian, LCDR, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Berrigan, Michael, Mr, DoD OGC; [redacted] Gibbs, Rudolph, TSGT, DoD OGC; Jackson, Tracy, MSgt, DoD OGC; [redacted] LN1, DoD OGC; 'McMillan, Joseph M. (Perkins Coie)'; Morris, Lawrence, COL, DoD OGC; 'Murphy, John'; Murphy, John, Mr, DoD OGC; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC; [redacted]
Subject: FW: U.S. v. Hamdan - Government Special Request for Relief - Request for Continuance - and Defense Request for Continuace

CAPT Allred has directed that I forward the email below to counsel and other interested persons.

v/r,

LTC Mike [redacted]l, USAR
Senior At[redacted]Advisor
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----
From: Allred, Keith J CAPT NAVMARTRIJUDCIR SW, CMJ [redacted]
Sent: Friday, March 28, 2008 15:14
[redacted]or
Continuance and Defense Request for Continuace

LTC [redacted]

Please forward to the parties in the case of United States v. Hamdan and others who may be interested:

Counsel:

I have been out of the office for the past few days handling another case, and apologize for the delay in responding to your requests for continuance. Let me address them separately as I understand them, and you may correct me if I have gotten it wrong:

1. The Defense requested a continuance of the deadline to file motions to suppress evidence because the Government has not yet completed delivery of its discovery. The Defense is waiting, in essence, for me to rule on D 018 (names of investigators) and D-022 (Records of Confinement). I have not yet begun working on D-018, but will move that motion to the top of my pile and resolve it first thing next week. One obstacle has been that I do not yet have a SIPRNET account here at my office. I will renew my efforts to get that organized. I left Guantanamo Bay on 7-8 February with the impression that D-022 was resolved, as the Government indicated that it had no objection to compliance, and had delivered to the defense everything responsive to the request before we left the island. Apparently there are additional materials at issue that the Government has not provided. TC: do you object to providing the "interrogation plans and manuals or lists authorized interrogation techniques"? If so, I will provide a written ruling on that request by early next week. If not, please so indicate and deliver the materials at issue.

I will grant the Defense request for a continuance of the deadline to file suppression motions until next Friday, April 4th. In the meantime, I will resolve these

two motions with affirmative rulings (unless TC indicates that it intends to provide the materials related to the conditions of confinement). I still want to litigate suppression motions at our 28 April session, and to adhere to our 28 May trial date.

2. The Defense also requested a continuance of the deadline for response to the Motion to Pre-admit (P003) until ten days after the issue of Professor William's employment is resolved. This motion is granted. If necessary, we can simply resolve the admissibility of the al Qaeda Plan at trial, and not pre-admit it.

3. The Government has requested a continuance of the deadline to respond to the Motion regarding defense Counsel access to detainees in Guantanamo. The Defense has agreed to a continuance until today, Friday 28 March at 1630. That request was granted telephonically yesterday. I will look for your reply by COB today.

R,
Judge Allred

-----Original Message-----
From: Britt, William, LTC, DoD [redacted]
Sent [redacted],
Cc: Berrigan, Michael, Mr, Do [redacted];
David, Steven, C [redacted] GC;
Allred, Keith J [redacted],
DoD OGC; Mo [redacted],
Clayton G; [redacted], Ms, DoD OGC; McMillan, Joseph M. (Perkins Coie)
Subject: RE: U.S. v. Hamdan - Government Special Request for Relief - Request for Continuance and Defense Request for Continuace

LTC Chappel, please accept for filing this Government Response to the Defense Request for a Continuance.

1. The Defense consented to the Government's request for a two day continuance to file its Response to the Defense Access Motion D023.
Accordingly, the Government consents to a reciprocal two day continuance for the Defense. The Government, therefore, respectfully requests the Court issue an amended motion schedule to reflect this change and any other relief the Court may grant.

2. The Government continues to object to a continuance beyond the additional two days to which the Government consents.

Respectfully submitted,

LTC William Britt, Prosecutor

_____

[redacted] PM
[redacted];
[redacted]: RE: U.S. v. Hamdan - Government Special Request for Relief - Request for Continuance

Thanks.

v/r,

[redacted]ry Commissions Trial Judiciary
Department of Defense

From: Sch[redacted]oie)
[mailto:H[redacted]m]
Sent: Wed[redacted]5:52
[redacted]
Cc: Berrigan, Michael, Mr, DoD OGC; c[redacted]; [redacted], DoD OGC; Ja[redacted]Sgt, DoD OGC; [redacted], DoD OGC; McMillan, Joseph M. (Perkins [redacted]awrence, COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC
Subject: RE: U.S. v. Hamdan - Government Special Request for Relief - Request for Continuance

LTC [redacted]

On behalf of the Defense I conferred with LTC Britt within the last 15 minutes, and based on that conversation, the Defense does not object to the two-day continuance requested by the Prosecution.

Harry Schneider

From: Britt, William, LTC, DoD OGC [m[redacted]
Sent: Wednesday, March 26, 2008 11:45
To: [redacted]ell, Danny, LTC, DoD [redacted]s, Lawrence, COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Schneider, Harry (Perkins Coie); Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC
Subject: RE: U.S. v. Hamdan - Government Special Request for Relief - Request for Continuance
Importance: High

LTC [redacted], please accept for filing this Government Request for a two day [redacted]ance to prepare and file a response to D-023; Defense Motion for Order Relating to Access for Detainees' Counsel.

1. The Government understands that their Response is due by 1630 today; 26 March 2008.

2. During the course of the preparation of this Response, the Prosecution has learned that there are potentially, various protective orders issued by other courts (i.e., the D.C. Circuit - and possibly the D.C. District Courts) that govern habeas/DTA counsel access to detainees. It is imperative that the Prosecution address the issues potentially raised by these standing Orders.

3. Relevant, but less important, is the fact that several members of the Prosecution team traveled to GTMO last week to make preparations for trial.

4. Accordingly, the Prosecution will require a continuance until 1630, 28 March 2008, to contact various courts and Government agencies in order to determine the impact of the Government's position as set forth in its response and, more importantly, on the Military Judge's ultimate ruling.

5. The Government attempted to contact the Defense at the present time but were unable to do so. We are presently submitting this request due to the current time (1440).

Respectfully submitted,

LTC William Britt, Prosecutor

[redacted]rence, COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Schneider, Harry (Perkins Coie); Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC
Subject: U.S. v. Hamdan - Defense Special Request for Relief - Request for Continuance

LTC [redacted]

Please accept for filing in the case of United States v. Hamdan this Defense Special Request for Relief - Request for Continuance.

1. The deadline for the Prosecution to complete discovery, or to inform the Military Judge of any defects in discovery, was 31 December 2007.

2. Having failed to receive all requested discovery, on 1 February 2008, the Defense moved for an order compelling production of the names and contact information of all government agents involved in the investigation of Mr. Hamdan's case, including those involved in the filming and interrogation of Mr. Hamdan on 26 November 2001 (D018), and on 4 February 2008, the Defense moved for an order compelling production of records relating to Mr. Hamdan's confinement, including interrogation plans and manuals or lists of authorized interrogation techniques (D020). Each motion sought to compel the production of information first requested by the Defense on 21 May 2007.

3. The Military Judge has not yet ruled on the Defense motions.

4. The Defense continues to require production of all requested discovery in order to prepare for trial. The discovery specifically sought in D018 and D022 is necessary for the Defense motions to suppress

evidence which are due on 28 March 2008. The Defense notes that statements made by the United States in other military commission cases make clear that the Prosecution continues to possess discoverable information that it has not turned over to the Defense. (See, e.g. Statement by Major Groharing, United States v. Khadr, 13 March 2008, regarding the existence of Standard Operating Procedures for Bagram) (transcript not yet available).

5. The Defense has also sought the assistance of several expert consultants and witnesses. The Defense's request for continued employment of Dr. Emily Keram was submitted on 12 February 2008. The Convening Authority denied the request based on insufficient justification. The Defense resubmitted its request on 17 March 2008. The Convening Authority has not yet responded. Dr. Keram's input is essential for the Defense motion to suppress out-of-court statements.

6. The Defense requested employment of Dr. Brian Williams on 8 March 2008. The Convening Authority denied that request on 12 March 2008. The Defense moved for an order authorizing the employment of Dr. Williams on 24 March 2008. Dr. Williams' assistance is necessary for the Defense to prepare its response to the Prosecution's motion to preadmit into evidence a video prepared by Mr. Evan Kohlmann. The Defense response to that motion is due on 11 April 2008.

7. The Defense also submitted a request for the employment of Dr. Marc Sageman on 20 March 2008. That request has not yet been approved or denied.

8. The Defense is wholly unable to prepare its case without access to discovery and expert consultants and witnesses.

9. Accordingly, the Defense requests a continuance of the 28 March 2008 deadline with respect to any motion to suppress evidence. The Defense seeks a continuance to ten (10) days after the Defense either receives all requested discovery, or its discovery motions (D018 and D020) are denied by the Military Judge. The Defense also seeks a continuance of its deadline to respond to the Government Motion to Pre-admit Evidence (the al Qaida Plan) (P003) to ten (10) days after the Convening Authority approves the employment of Professor Williams.

10. Although at this time the Defense is not seeking a continuance of the 28 May 2008 trial date, the Defense accepts responsibility for any delay to the trial schedule that might result should its request for a continuance be granted. The Defense believes any delay would be in the interests of justice.

11. The Defense attempted to contact the Prosecution to confer on the requested relief but was unable to do so. The Defense believes the Prosecution will respond to this special request upon receipt.

Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Commissions
[redacted]

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**Defense Request for Production of Witnesses** for Hearing Scheduled for 28 April 2008 28 March 2008

Pursuant to R.M.C. 703, the Defense requests that the Government provide the following witnesses for the Defense at the military commission session scheduled to commence on 28 April 2008, at the Courtroom in Guantanamo Bay, Cuba.

1. Dr. Emily Keram

[redacted]

[redacted]

Synopsis of Expected Testimony – D019 (Conditions of Confinement)

Dr. Keram will testify in support of Defense Motion for Relief from Punitive Conditions of Confinement and for Confinement Credit or, Alternatively, Abatement (D019). Dr. Keram will testify that, based on her interviews of Mr. Hamdan and her clinical experience as a forensic psychiatrist, the imposition of solitary confinement on Mr. Hamdan has had severe psychiatric effects that will continue and worsen if his conditions of confinement are not altered. Specifically, Dr. Keram will testify that she has observed in Mr. Hamdan symptoms of Posttraumatic Stress Disorder including nightmares, intrusive thoughts, memories and images, amnesia for details of traumatic events, lack of future orientation, anxiety, irritability, insomnia, poor concentration and memory, exaggerated startle response, and hypervigilence. She has also observed symptoms of Major Depression including depressed mood, sleep and cognitive disturbances as above, anergia, anhedonia, hopelessness, and helplessness. These symptoms were severely exacerbated by his incarceration in solitary confinement.

Based on her extensive experience, Dr. Keram will also testify regarding the effects of solitary confinement more generally. She will testify that solitary confinement has profound effects on a person's personality. In addition to exacerbating any ongoing psychiatric symptoms, solitary confinement has been found to be associated with depression, anxiety, irritability, panic attacks, hopelessness, helplessness, suicidal ideation, poor concentration and memory, hypersensitivity to perceptual stimuli, perceptual distortions, illusions, and thought disorder. Persons so confined may develop paranoia, obsessional thoughts, and primitive thoughts of harm to self and others, which may be acted upon.

Relevance and Necessity of Testimony – D019 (Conditions of Confinement)

Dr. Keram's is highly relevant to the Defense motion as her observations form a basis for the request that Mr. Hamdan's conditions of confinement be altered. Dr. Keram is an eminently qualified psychiatrist whose testimony will assist the military commission in understanding the psychological effects of solitary confinement generally and on Mr. Hamdan. Dr. Keram has spent a considerable amount of time interviewing Mr. Hamdan to form a clinical opinion and her testimony cannot be substituted.

Synopsis of Expected Testimony – Defense Motion to Suppress Out-of Court Statements of the Accused Based on Coercive Interrogation Practices[1]

Dr. Keram will also testify in support of Defense Motion to Suppress Out-of Court Statements of the Accused Based on Coercive Interrogation Practices. Dr. Keram will testify regarding Mr. Hamdan's mental state during the course of interrogations in Afghanistan and Guantanamo. Dr. Keram will testify that Mr. Hamdan experienced a real fear of death in Afghanistan that caused him to make every effort to please his interrogators in order to spare his life. This included providing them with answers he believed they wanted to hear. Dr. Keram will testify that the fear experienced by Mr. Hamdan operated as a coercive factor and influenced him to provide information to his interrogators that he would not have absent the coercion. Dr. Keram will further testify that information obtained from Mr. Hamdan in that coercive setting is wholly unreliable, as the fear of death caused him to provide any information – including false information – he believed was necessary in order to preserve his life.

Relevance and Necessity of Testimony – Defense Motion to Suppress Out-of Court Statements of the Accused Based on Coercive Interrogation Practices

Dr. Keram's testimony is highly relevant as it will help establish a factual basis for the motion – that out-of-court statements were obtained by coercion – as well as the unreliability of such statements. Dr. Keram is uniquely situated to assist the Defense in this fashion as she has spent dozens of hours interviewing Mr. Hamdan and reviewing the circumstances of his interrogation. Dr. Keram's medical and psychiatric training provide her with the tools to properly analyze Mr. Hamdan's mental state.

[1] The Defense will file this motion on 4 April 2008.

2. Omar Khadr
Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

On information and belief, Mr. Khadr is currently located in Camp IV, Camp Delta, Guantanamo Bay, Cuba. Mr. Khadr will likely testify regarding the conditions of confinement in Camp IV, the effect solitary confinement had on him and on his ability to work with his counsel, and the change to his ability to participate in his own defense and work with counsel since his transfer to Camp IV. Mr. Khadr will also likely testify regarding the circumstances of his transfer to Camp IV.

Relevance and Necessity of Testimony

Mr. Hamdan seeks relief from punitive pretrial conditions of confinement and a transfer to Camp IV in order to allow him to assist in his own defense. Mr. Khadr's testimony regarding Camp IV, how he came to be there and the effect it has on his own attorney-client relationship is highly relevant. To the Defense's knowledge, Mr. Khadr is the only other detainee currently facing charges in a military commission who is also housed in Camp IV. Mr. Khadr's testimony, therefore, is unique. It also may provide a rebuttal to testimony the Government may present regarding the detention of detainees being tried by military commission.

3. Captain Patrick McCarthy, Staff Judge Advocate, JTF-GTMO
Office of the Staff Judge Advocate, JTF-GTMO
Guantanamo Bay, Cuba

[redacted]

Synopsis of Expected Testimony

Captain McCarthy will testify in connection with D019. He is in a position to know the reason, if any, behind Mr. Hamdan's frequent isolation in solitary confinement and his transfer from Camp Delta where he was held pursuant to court order. Captain McCarthy will likely testify regarding what steps he took, if any, as a result of Mr. Hamdan's multiple requests for a transfer out of solitary confinement, the reasons for the lack of action on those requests, and any relevant policy, procedure or practice of JTF-GTMO that might affect Mr. Hamdan's conditions of confinement.

Relevance and Necessity of Testimony

Captain McCarthy is in a position to know the basis, if any, for placing Mr. Hamdan in solitary confinement. His information regarding how detainees are selected for detention in various camps, as well as specifically how the decision to transfer Mr. Hamdan is made, is highly relevant to the Defense motion. Captain McCarthy's testimony is necessary to provide information from JTF-GTMO that will not otherwise be available to the commission.

4. Colonel Morris Davis, USAF
Director, United States Air Force Judiciary Building 5683
112 Luke Avenue, Suite 301
Bolling Air Force Base, DC 20032-8000

[redacted]

Synopsis of Expected Testimony

Colonel Davis will testify in support of Defense Motion to Dismiss the Charges and Specifications for Unlawful Influence. Colonel Davis will testify that he believes the structural separation between the Convening Authority and the Office of the Chief Prosecutor required by the Military Commissions Act has been thwarted by the current Convening Authority, Susan Crawford, and her Legal Advisor, Brigadier General Thomas Hartmann. Colonel Davis will testify that the Convening Authority's staff review evidence prior to swearing of charges, direct the prosecution's preparation of cases, draft charges and assign prosecutors to cases. He will testify that, contrary to Colonel Davis' own belief as to the appropriate use of evidence, General Hartmann directed that evidence that had been obtained by torture be used in the prosecution of military commission cases.

Colonel Davis will also testify that the role of the Legal Advisor to the Convening Authority has been directed by political rather than legal considerations. Specifically, Colonel Davis will testify that William J. Haynes, former General Counsel for the Department of Defense, told him that the military commissions process could not allow for acquittals. He will further testify that Mr. Haynes asked him to charge detainees prior to the implementation of the Regulation for Trial by Military Commissions, and that Colonel Davis believes that request was politically motivated.

Colonel Davis will testify that the position of the Convening Authority (and her Legal Advisor) is fundamentally different under the MCA than the UCMJ. He will testify that he personally drafted the portion of the MCA inserted into the statute by Senators Graham and McCain that prohibits influence over "the exercise of professional judgment by trial counsel or defense counsel." He will testify that the Legal Advisor and the DoD General Counsel attempted to influence his exercise of professional judgment, in contravention of the statute.

Relevance and Necessity of Testimony

Colonel Davis' testimony will provide essential information regarding the structure of the relationship between the Office of the Chief Prosecutor and the Convening Authority. His testimony is essential in order to demonstrate the evidence of the unlawful influence exerted by the Convening Authority and her Legal Advisor. His testimony is highly relevant to the Defense Motion to Dismiss the Charges and Specifications for Unlawful Influence, and essential as he served as Chief Prosecutor while that office was subject to unlawful influence.

5. Mr. Michael Berrigan, Deputy Chief Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301

[redacted]

Synopsis of Expected Testimony

Mr. Berrigan will testify in support of Defense Motion to Dismiss the Charges and Specifications for Unlawful Influence. Mr. Berrigan will testify that he erroneously received a copy of the draft charge sheet for Khalid Shayk Muhammad from a member of the office of the Legal Advisor to the Convening Authority. After notifying the sender that he had inadvertently received the draft, Mr. Berrigan consulted with his state bar and elected not to return the draft. Mr. Berrigan will testify that General Hartmann contacted his supervisor, the Chief Defense Counsel, and demanded the return of the draft charge sheet.

Relevance and Necessity of Testimony

Mr. Berrigan's testimony is relevant as it demonstrates attempts by the Legal Advisor to exert unlawful influence over the Chief Defense Counsel and Deputy Chief Defense Counsel. His testimony will also demonstrate the close connection between the Convening Authority's office and the Office of the Chief Prosecutor – so close that the Legal Advisor's staff was involved in drafting the very charge sheets that the Legal Advisor must later opine on when recommending action for the Convening Authority. Mr. Berrigan's testimony is necessary to demonstrate the full range of attempted influence by the Convening Authority/Legal Advisor, and to demonstrate the improper role the Legal Advisor has taken with respect to prosecutorial functions.

Respectfully submitted,

By: _____

LCDR BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
[redacted]8

PROF. CHARLES SWIFT
Emory School of Law
[redacted]
Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP
[redacted]00

[redacted]

From: Prasow, Andrea, Ms, DoD OGC
Sent: Friday, March 28, 2008 3:54 PM
To: Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC; Murphy, John, Mr, DoD OGC
Cc: [redacted] Joseph M. (Perkins Coie); Mizer, Brian, LCDR, DoD [redacted] DoD OGC; [redacted]
Subject: U.S. v. Hamdan - Defense Request for Production of Witnesses at 28 April Hearing
Signed By: [redacted]
Attachments: Defense Request for Production of Witnesses at 28 April Hearing.pdf

Gentlemen,

Attached please find the Defense Request for Production of Witnesses for Hearing Scheduled for 28 April 2008.

[redacted] - the Defense is submitting this request to the MCTJ staff and the Military Judge as a courtesy and does not expect it to receive a filing designation.

Thank you,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions
[redacted]

UNITED STATES OF AMERICA	)	
	)	
	)	**Government Request for**
vs.	)	**Discovery and Reciprocal Discovery**
	)	
	)	
SALIM AHMED HAMDAN	)	24 March 2008

1. The Government, through undersigned counsel in the above styled case, hereby requests Discovery and Reciprocal Discovery under the provisions of the Military Commissions Act, Manual for Military Commissions and other relevant legal authority. The filing of this Request in no way signifies the failure of the Defense to comply with any discovery obligation *as of the date of this filing.*

2. The Government requests the following information pursuant to Rule for Military Commission (R.M.C.) 701(g):

(1) *Names of witnesses and statements.*

(A) the names and contact information of all witnesses, other than the accused, whom the defense intends to call during the defense case-in-chief and provide sworn or signed statements known by the defense to have been made by such witnesses in connection with the case;

(B) the names of any witnesses whom the defense intends to call at the presentencing proceedings; and

(C) the opportunity to examine any written material that will be presented by the defense at the presentencing proceeding.

(2) *Notice of certain defenses.* The defense's intent to offer the defense of alibi or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense.

(3) *Documents and tangible objects.* The opportunity to examine books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) *Reports of examination and tests.* The opportunity to examine any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are within the possession, custody, or control of the defense that the defense intends to introduce as evidence in the

defense case-in-chief at trial or that were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.

3. *Judicial Notice*. The Government requests, pursuant to Military Commission Rule of Evidence (Mil. Comm. R. Ev.) 201 reasonable notice of the Defense's intent to request the Court take Judicial Notice of adjudicative facts. Furthermore, pursuant to Mil. Comm. R. Ev. 201A(b), the Government requests reasonable written notice of the Defense's intent to raise an issue concerning the law of a foreign country, the law of an international forum, or the international law of war.

4. *Expert Witnesses*. The Government requests the name, contact information and *curriculum vitae* of any expert witness the Defense intends to call at trial and copies or reports or examinations prepared or relied upon by this witness. Notice to the Government of the Defense's potential reliance on expert testimony is not an agreement on the part of the Government that said witness is, in fact, an expert, but if so recognized, that the witness's testimony is relevant and material to this case.

5. *R.M.C. 706*. The Government requests and moves the Court to release to trial counsel, the full contents, other than statements made by the accused, of any report prepared pursuant to R.M.C. 706 if the defense offers expert testimony concerning the mental condition of the accused.

(1) Should the defense offer statements made by the accused at an R.M.C. 706 examination, the Government requests and moves the Court to order disclosure of such statements made by the accused and contained in the report.

(2) The Government specifically objects to the Defense offering any expert medical testimony as to any issue that would have been the subject of the mental examination should said accused refuse to cooperate in a mental examination authorized under R.M.C. 706.

6. *Other Affirmative Defenses.* The Government requests notice of any intent to raise any affirmative defense, referenced or not referenced in this Request, to any charge. Notice to the Government of such a defense is not an agreement on the part of the Government that such a defense is cognizable in a Military Commission, or if it is, that it applies or operates as a defense to the charges as set forth against the accused.

7. *Classified Information*. The Government requests written notice of the Defenses reasonable expectation to disclose or cause the disclosure of classified information in connection with a military commission proceeding pursuant to Mil. Comm. R. Ev. 505 (g).

8. *Continuing Duty to Disclose*. The defense has a continuing duty to disclose if the defense discovers additional evidence or material requested or required to be produced, which is subject to discovery or inspection. Furthermore, the defense will promptly

notify the Government or the Military Judge of the existence of the additional evidence or material.

9. *No Waiver.* This Discovery Request will not be interpreted as a waiver of any other rights the Government has to discovery arising from any lawful source.

Respectfully submitted,

WILLIAM B. BRITT
LTC, JA, USAR
Prosecutor

TIMOTHY D. STONE
LCDR, JAGC, USN
Prosecutor

JOHN MURPHY
DEPARTMENT OF JUSTICE
Prosecutor

/s/
CLAYTON TRIVETT
OFFICE OF MILITARY COMMISSIONS
Prosecutor

[redacted]

From: Britt, William, LTC, DoD OGC
Sent: Monday, March 24, 2008 7:27 PM
To: [redacted]C
Cc: Berrigan, Michael, Mr, DoD OGC; [redacted]LN1, DoD OGC; 'McMillan, Joseph M. (Perkins Coie)'; Morris, Lawrence, COL, DoD OGC; 'Murphy, John'; 'Schneider, Harry (Perkins Coie)'; Trivett, Clayton, Mr, [redacted]G, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC; [redacted]m'; Murphy, John, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC; Morris, Lawrence, COL, DoD OGC; Pagel, Bruce, COL, DoD OGC; Stone, Tim, LCDR, DoD OGC
Subject: Request for Reciprical Discovery

Importance: High

Attachments: Govt Request for Discovery - Hamdan 20080324.pdf

Govt Request for Discovery - H...

Sir/ALCON - Please find the Government's request for reciprocal discovery in the case of US v. Hamdan. Thank you. LTC Britt.

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**D-023 Defense Reply** to Defense Motion for Order Relating to Access for Detainees' Counsel 2 April 2008

1. Timeliness: This brief is filed within the time frame permitted by the Military Commissions Trial Judiciary Rules of Court.

2. Relief Sought: Defendant Salim Ahmed Hamdan seeks an Order permitting habeas/DTA counsel for certain detainees who are potential witnesses in this matter to meet with their clients, for the purpose of advising those clients regarding written questions submitted by the Defense, as authorized by the 13 February 2008 Ruling on Motion to Compel Access to High Value Detainees (D 011) ("Ruling"). In the alternative, the Defense requests a ruling by the Commission that the detainees in question are not represented by counsel in Commission matters.

3. Law and Argument:

The Military Judge's Order granting the Defense access to the witnesses at issue directed the Defense to "determine whether any of these prospective witnesses are represented by Counsel, and shall act accordingly." Ruling at 5. The Defense complied with that requirement by notifying the attorneys it was able to locate who purport to represent the prospective witnesses, who are habeas/DTA counsel.[1] These attorneys, without discussing the matter with their clients, have objected to the submission of written questions (or in the case of Abdul-Rahim al-Sharqawi, to further communications). In order to ensure that its actions are fully consistent with the prospective witnesses' rights to counsel and do not run afoul of the Ruling or any other

[1] In addition to sending a copy of its written questions to all attorneys other than those representing Mr. Sharqawi, the Defense sent a copy of this motion to habeas/DTA counsel for all four of the prospective witnesses at issue. Counsel for Mr. al-Nashri has stated to the Defense that counsel intends to inform the Military Judge of its position on this motion.

applicable law, the Defense brings this motion seeking an Order clarifying the appropriate next step in light of the stated objections from habeas/DTA counsel.

The Prosecution's Response brief makes light of the motion, stating that it has "no basis in law or logic." Gov't Response at 2. But without further order from the Military Judge it is arguably unclear if the Defense should proceed with the already-granted access to these four prospective witnesses. Thus, quite definitely some relief is needed.

As to Mr. Sharqawi, the Prosecution argues that the Ruling of 13 February 2008, which included Mr. Sharqawi in the list of witnesses to whom the Defense could have access solely by means of written questions, trumps or supersedes the Military Judge's 5-6 December 2007 order granting direct access to Mr. Sharqawi. Gov't Response at 3 n.5. Any such limitation on access to Mr. Sharqawi would be inappropriate. The Military Judge fully considered access to Mr. Sharqawi in December and determined that the Defense is entitled to direct access. The Defense understands that Mr. Sharqawi is not a "high-value detainee" and thus the Government's security concerns, which were the basis for the Military Judge's allowance of written questions rather than direct access to other prospective witnesses, do not apply. In light of the Prosecution's position, the Defense requests that the Military Judge clarify that the Defense may have direct access to Mr. Sharqawi, as ordered in December 2007.

As to all four of the prospective witnesses at issue, the Defense motion makes two alternative requests. First, the Defense requests that the Military Judge order the Government to afford habeas/DTA counsel access to their clients so that they may discuss and advise their clients regarding the Defense's access. Def. Motion at 4-5. In response to this request, the Prosecution argues that it has no power to facilitate access and that the requested order would "infringe upon the security requirements and procedures" that have been put in place by Article III courts in habeas/DTA actions. Gov't Response at 4. But the Prosecution's Response makes absolutely no attempt to show how facilitating visits between counsel and their clients would infringe the protective orders, and in fact the Prosecution does not even attach or cite any

applicable substantive provisions of the protective orders that would supposedly be violated. It is the Defense's understanding that habeas/DTA counsel do visit their clients, including high-value detainees, and that such visits are not barred by the protective orders in place in habeas/DTA cases.

Second, the Defense argues that if the Prosecution takes the position that habeas/DTA counsel do not represent the prospective witnesses with respect to the matters at hand and the Military Judge agrees, the Military Judge should order that the Defense's written questions be immediately submitted to Mr. al-Shib, Mr. al-Libi, and Mr. al-Nashri and that the Defense may proceed with direct access to Mr. Sharqawi. Def. Motion at 5-6. As anticipated, the Prosecution strenuously asserts in its Response that these attorneys do not represent their clients in connection with this matter. Gov't Response at 5. The Prosecution further states that "the Defense should submit its written questions to the Security Officer in accordance with this Court's prior order." *Id.* Thus, the Prosecution does not disagree with the alternative relief requested by the Defense, and it is inexplicable why the Prosecution argues in the next sentence of its Response that "[t]here is no basis in law for this court to grant the relief requested." *Id.*

The Prosecution's Response only serves to underscore the reasons why the relief requested by the Defense on this motion is necessary and appropriate. The Defense requests that the Military Judge grant the motion.

Respectfully submitted,

By: 
LCDR BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
[redacted]

PROF. CHARLES SWIFT
Emory School of Law
[redacted]
Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP
[redacted]
Civilian Defense Counsel

[redacted]

From: Prasow, Andrea, Ms, DoD OGC

Sent: Wednesday, April 02, 2008 3:07 PM

To: [redacted]

Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; [redacted] MSgt, DoD OGC; David, Steven, COL, DoD OGC; Gibbs, Rudolph, TSGT, DoD OGC; Jackson, Tracy, MSgt, DoD OGC; [redacted], LN1, DoD OGC; McMillan, Joseph M. (Perkins Coie); Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Schneider, Harry (Perkins Coie); Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC

Subject: U.S. v. Hamdan - D-023 Defense Reply to Defense Motion for Order Relating to Access for Detainees' Counsel

Signed By: [redacted]

Attachments: D023 Defense Reply to Defense Motion for Order Relating to Access for Detainees' Counsel.DOC; D023 Defense Reply to Defense Motion for Order Relating to Access for Detainees' Counsel.pdf

[redacted]

Attached for filing in the case of *United States v. Hamdan* please find D-023 Defense Reply to Defense Motion for Order Relating to Access for Detainees' Counsel. The PDF version is signed and the Word version is unsigned.

Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions
[redacted]

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**D025 - Defense Reply** to Government Response to Defense Motion to for Employment of an Expert Witness 2 April 2008

1. Timeliness: This Reply is filed within the time frame permitted by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's orders dated 20 December 2007 and 15 February 2008.

2. Overview: Professor Williams' expert assistance is necessary if Mr. Hamdan is to defend against the charged offenses of material support for terrorism and material support for a terrorist organization. Professor Williams' testimony will also allow Mr. Hamdan to establish the affirmative defense of lawful combatancy. Finally, Professor Williams' expert assistance is necessary to assist the Defense as it prepares to rebut the testimony of the Prosecution's expert witness.

3. Law and Argument:

A. Professor Williams' Expert Assistance is Both Relevant and Necessary for Mr. Hamdan's Defense

Like the Convening Authority, the Prosecution wholly fails to address the necessity of Professor Williams' assistance in defending against the charges, regardless of whether Professor Williams' testimony can establish the affirmative defense of lawful combatancy. The first four Specifications of Charge II allege that Mr. Hamdan supplied weapons to terrorists or terrorist organizations. To be convicted of providing material support for terrorism, it must be shown that Mr. Hamdan provided the weapons to *terrorists* knowing or intending that they be used to carry out *terrorism*. 10 U.S.C. 950v(25) (2006). It is not a crime to provide weapons to lawful combatants or to the Taliban army knowing or intending that they be used for the lawful defense of Afghanistan. Professor Williams will testify that the intended recipients of the missiles were not terrorists. He will also testify that SA7 missiles had not been used by terrorists to commit

terrorism at the time of Mr. Hamdan's capture. In fact, there is not a single recorded incident of SA7 missiles being used by terrorists for terrorist activities inside Afghanistan. And the first publicly reported use of SA7 missiles by Taliban fighters did not occur until July 22, 2007. Tom Coghlan, *Taliban in first heat-seeking missile attack*, Telegraph, Jul. 29, 2007 (Appendix A).

During proceedings before this Court in February 2008, the Prosecution stated, "we do not necessarily intend to prove to whom [Mr. Hamdan] was delivering weapons." February Record at 168. "What we do intend to prove is that to whomever he was intending to deliver the weapons, they were an unlawful fighting force." February Record at 168. When asked by the Commission if the Taliban army's defense of Kandahar was an act of terrorism the Prosecution responded, "Yes, sir." February Record at 169. The Prosecution then appeared to abandon this claim and insisted "these missiles were intended to be delivered to a fighting force that is unlawful and since that's a violation of the Law of War." February Record at 170.

While the Prosecution may still be unaware of its theory of its case, the Defense must prepare to defend against any of the Prosecution's theories that were advanced in Court in February. To the extent that the Prosecution does not intend to prove who the recipients of the missiles were but rather that all Arab and Taliban fighters were terrorists, Professor Williams will testify that the Arab 055 brigade and Taliban army were an organized army that complied with the laws of war. December Record at 381-84. The Taliban had an airforce, artillery, and "T55 tanks and T62 main battle tanks…." December Record at 385. Professor Williams testified that the terrorist arm of Al Qaeda, Al Qaeda *al soulba*, carried out only one terrorist attack inside of Afghanistan, which was the September 9, 2001, assassination of Northern Alliance Commander General Massoud. December Record at 401. Professor Williams also testified that Kandahar was defended by remnants of the Taliban army and the Ansar brigade. December Record at 408-09. This directly refutes the Prosecution's claim that the forces defending Kandahar at the time of Mr. Hamdan's capture were terrorists. And even if the Prosecution's third theory of culpability ─ that Mr. Hamdan is guilty of providing weapons to

unlawful enemy combatants and not terrorists ─ were a crime under the Military Commissions Act, Professor Williams would testify that the Taliban army and Ansar brigades generally complied with the laws of war and did not engage in terrorism. December Record at 382, 410-411.

Professor Williams' testimony is vital if Mr. Hamdan is to be permitted to put on a defense. *United States v. McAllister*, 64 M.J. 248, 252 (C.A.A.F. 2007).

B. Professor Williams' Testimony is both Relevant and Necessary for Mr. Hamdan to Establish the Affirmative Defense of Lawful Combatancy

Mr. Hamdan can establish the affirmative defense of lawful combatancy by producing some evidence that he was either a lawful combatant himself or a supply contractor for lawful combatants. Geneva Convention Relative to the Treatment of Prisoners of War, Article 4.A(4). The Prosecution asserts that Professor Williams' testimony is not relevant because Professor Williams cannot establish all of the elements of the affirmative defense of lawful combatancy. Prosecution Response at 2. The Prosecution cites no authority for the proposition that an expert witness is not relevant if he is unable to establish every element of an affirmative defense. Professor Williams' testimony is necessary if the Defense is to put on some evidence that the Taliban and Ansar units were the regular armed forces that complied with the law of war. Independent of Professor Williams, the Defense may offer evidence that Mr. Hamdan wore uniforms, that he was permitted by the Taliban government to carry arms openly, and that he was doing so on the day of his capture.

While Mr. Hamdan was not wearing a military uniform at the time of his capture, the obligation to wear a uniform applies only to combatants, and even then only when combatants are actively engaged in military operations. THE MANUAL OF THE LAW OF ARMED CONFLICT, U.K. MINISTRY OF DEFENSE 42 (2004). The Defense is unaware of the "undisputed facts" referenced in the Prosecution's Response that Mr. Hamdan "openly admits that he was taking an active part in hostilities while not wearing a uniform…." Prosecution Response at 2. And the

Prosecution provides no citation or reference to these "undisputed facts." Mr. Hamdan was completely unaware of the presence of U.S. forces in Taktepol, and there is nothing that has been discovered to the Defense that suggests that he was attempting to engage U.S. forces when he was captured.

While two of the elements of the defense of lawful combatancy involve elements that the Defense can establish through the introduction of evidence, the remaining two elements can only be established through the expert testimony of Professor Williams.

C. Mr. Hamdan Must be Afforded the Same Opportunity to Consult with Experts as the Prosecution

Citing *United States v. Washington*, 46 M.J. 477 (C.A.A.F. 1997), the Prosecution argues that the Defense is not automatically entitled to expert assistance when the Prosecution has sought such assistance. Prosecution Response at 2. More accurately, *Washington* stands for the proposition that "the defense cannot establish its inability to gather evidence, even in a foreign country, simply by noting that the prosecution employed expert assistance to prepare its case." *Washington*, 46 M.J. at 480. Unlike the defense team in *Washington*, the Defense in this case is not seeking a defense investigator to gather evidence in a foreign country and relying solely on the fact that the government employed investigators to investigate the case as the basis for its request. In this case, the Defense has demonstrated why Professor Williams' testimony is relevant, what the expert assistance would accomplish for Mr. Hamdan, and why the Defense is unable to gather and present the evidence that Professor Williams would develop. *Id.* Specifically, Professor Williams will assist the Defense in its review of Mr. Evan Kohlmann's purported "documentary." And Professor Williams will assist the Defense in reviewing Mr. Kohlmann's qualifications to serve as an expert before this Commission including his academic credentials and publications that have been subject to peer review. "Where the Government has found it necessary to grant itself an expert . . . fundamental fairness compels the military judge to be vigilant to ensure that an accused is not disadvantaged by a lack of resources and denied

necessary expert assistance in the preparation or presentation of his defense." *United States v. Lee*, 64 M.J. 213, 217 (C.A.A.F. 2006).

The Prosecution asserts that assistance is not necessary because Mr. Kohlmann's film is "a straight forward recitation of information…." Prosecution Response at 2. "But no film ─ not even documentary or observational cinema or evidence verite ─ are objective representations of reality." Jessica M. Sibley, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 Colum. J. L. & Arts 107, 128 (2005); Roslyn Myers, *Documentaries & The Law: Crime Victims as Subjects of Documentaries: Explotation or Advocacy?*, 16 Fordham Intell. Prop. Media & Ent. L. J. 733 (2006) ("Nevertheless, documentaries have never been completely objective."). Mr. Kohlmann has assembled his "documentary" by selecting "topics, people, vistas, angles, lenses, juxtapositions, sounds, words." *Id.* "Each selection is an expression of his point of view, whether he is aware of it or not, whether he acknowledges it or not." *Id.*

Professor Williams' assistance is necessary to verify that Mr. Kohlmann's film is in fact the "straightforward recitation of information…." that the Prosecution claims it to be.

4. <u>Attachments</u>:

A) Tom Coghlan, *Taliban in first heat-seeking missile attack*, Telegraph, Jul. 29, 2007

Respectfully submitted,

By:
LCDR BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
[redacted]

PROF. CHARLES SWIFT
Emory School of Law
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Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP
[redacted]

Attachment A

Taliban in first heat-seeking missile attack

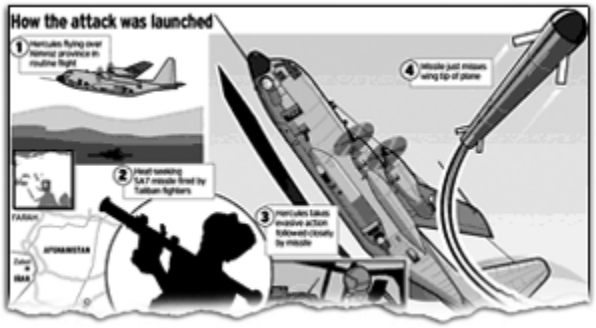
By Tom Coghlan in Kabul
Last Updated: 12:43am BST 29/07/2007

- **Frontline: Reports from Iraq and Afghanistan**

Taliban militants have used a heat-seeking surface-to-air missile to attack a Western aircraft over Afghanistan for the first time.

The attack with a weapon believed to have been smuggled across the border with Iran represents a worrying increase in the capability of the militants which Western commanders had long feared.

The Daily Telegraph has learnt that the Taliban attempted to bring down an American C-130 Hercules aircraft flying over the south-western province of Nimroz on July 22. The crew reported that a missile system locked on to their aircraft and that a missile was fired.



Click to enlarge: how the attack was launched

It closed in on the large C-130 aircraft, pursuing it as the pilots launched a series of violent evasive manoeuvres and jettisoned flares to confuse the heat sensors in the nose of the missile. Crew members said that they saw what they believe was a missile passing very close to the aircraft. The C-130 was not damaged in the attack.

Nato officials yesterday refused to confirm or deny that such an attack had taken place.

"If there was such an incident of the type you describe in Nimroz it is classified," said a Nato spokesman. "I can't release it, if in fact it did occur."

However, a surface-to-air missile alert was put out for Western aircraft travelling in the south-west of Afghanistan in the last week, which affected both civilian and military aircraft.

It was confirmed by civilian air operators in Helmand province. It remains in place. Western military commanders have been aware of concerted efforts by the Taliban to obtain shoulder-launched surface-to-air missiles, so-called Manpads (man portable air defence system).

The recent attack was probably with an SA7 shoulder-launched missile, an elderly model of Soviet or Chinese origin. Though relatively primitive they are still a potent weapon, particularly against low-flying helicopters, such as the workhorse Chinook transporters used by British forces in the southern Helmand province.

The C-130 attacked in Nimroz was flying at 11,000ft at the time of the attack, which is within the 2.5-5 km range of a shoulder-launched missile system such as the SA7.

Though the West supplied hundreds of sophisticated Stinger heat-seeking missiles to the Afghan Mujaheddin in the 1980s, they are not thought to be still usable because of the deterioration of their sophisticated electronics and battery systems.

As a contingency in 2002, the United States government offered an amnesty on Stingers and successfully bought back many of the missiles still in the arsenals of Afghan warlords for $40,000 a missile.

To date, the Taliban has shot down a number of Western helicopters, but only through the use of unguided rocket-propelled grenades, which have a range of only 500 yards.

In April members of the Special Boat Service operating in Nimroz province intercepted several truck loads of weapons coming across the Iranian border, including a working SA7 missile. It was one of a number of recent weapon caches that Western officials claim have been seized on the border with Iran, fuelling allegations by Britain and America that Iran, or elements within the Iranian government, have begun supplying arms to the Taliban.

Hundreds of SA7 missiles disappeared into the black market in Iraq in the aftermath of the fall of Saddam Hussein, where they have since been used to shoot down dozens of helicopters and aircraft, reportedly including a British C-130 in 2005.

Meanwhile, a Taliban spokesman said that the group would allow more time for an envoy from Seoul to travel to join talks for the release of 22 South Korean hostages. But the spokesman repeated the threat that militants would kill the 22 Christian missionaries.

[redacted]

From: Prasow, Andrea, Ms, DoD OGC

Sent: Wednesday, April 02, 2008 3:08 PM

To: [redacted]

Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; c[redacted]m; Cox, Dale, MSgt, DoD OGC; David, Steven, COL, DoD OGC; [redacted], DoD OGC; McMillan, Joseph M. (Perkins Coie); Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Schneider, Harry (Perkins Coie); Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC

Subject: U.S. v. Hamdan - D-025 Defense Reply to Government Response to Defense Motion for Employment of an Expert Witness (Williams)

Signed By: p[redacted]l

Attachments: D025 Defense Reply to Defense Motion for Expert Witness.doc; D025 Defense Reply with Attachments.pdf

LTC [redacted]

Attached for filing in the case of *United States v. Hamdan* please find D-025 Defense Reply to Government Response to Defense Motion for Employment of an Expert Witness. The PDF version is signed and includes an attachment; the Word version is unsigned and does not include the attachment.

Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
[redacted]s

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**D025 - Defense Reply** to Government Response to Defense Motion to for Employment of an Expert Witness 2 April 2008

1. Timeliness: This Reply is filed within the time frame permitted by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's orders dated 20 December 2007 and 15 February 2008.

2. Overview: Professor Williams' expert assistance is necessary if Mr. Hamdan is to defend against the charged offenses of material support for terrorism and material support for a terrorist organization. Professor Williams' testimony will also allow Mr. Hamdan to establish the affirmative defense of lawful combatancy. Finally, Professor Williams' expert assistance is necessary to assist the Defense as it prepares to rebut the testimony of the Prosecution's expert witness.

3. Law and Argument:

A. Professor Williams' Expert Assistance is Both Relevant and Necessary for Mr. Hamdan's Defense

Like the Convening Authority, the Prosecution wholly fails to address the necessity of Professor Williams' assistance in defending against the charges, regardless of whether Professor Williams' testimony can establish the affirmative defense of lawful combatancy. The first four Specifications of Charge II allege that Mr. Hamdan supplied weapons to terrorists or terrorist organizations. To be convicted of providing material support for terrorism, it must be shown that Mr. Hamdan provided the weapons to *terrorists* knowing or intending that they be used to carry out *terrorism*. 10 U.S.C. 950v(25) (2006). It is not a crime to provide weapons to lawful combatants or to the Taliban army knowing or intending that they be used for the lawful defense of Afghanistan. Professor Williams will testify that the intended recipients of the missiles were not terrorists. He will also testify that SA7 missiles had not been used by terrorists to commit

terrorism at the time of Mr. Hamdan's capture. In fact, there is not a single recorded incident of SA7 missiles being used by terrorists for terrorist activities inside Afghanistan. And the first publicly reported use of SA7 missiles by Taliban fighters did not occur until July 22, 2007. Tom Coghlan, *Taliban in first heat-seeking missile attack*, Telegraph, Jul. 29, 2007 (Appendix A).

During proceedings before this Court in February 2008, the Prosecution stated, "we do not necessarily intend to prove to whom [Mr. Hamdan] was delivering weapons." February Record at 168. "What we do intend to prove is that to whomever he was intending to deliver the weapons, they were an unlawful fighting force." February Record at 168. When asked by the Commission if the Taliban army's defense of Kandahar was an act of terrorism the Prosecution responded, "Yes, sir." February Record at 169. The Prosecution then appeared to abandon this claim and insisted "these missiles were intended to be delivered to a fighting force that is unlawful and since that's a violation of the Law of War." February Record at 170.

While the Prosecution may still be unaware of its theory of its case, the Defense must prepare to defend against any of the Prosecution's theories that were advanced in Court in February. To the extent that the Prosecution does not intend to prove who the recipients of the missiles were but rather that all Arab and Taliban fighters were terrorists, Professor Williams will testify that the Arab 055 brigade and Taliban army were an organized army that complied with the laws of war. December Record at 381-84. The Taliban had an airforce, artillery, and "T55 tanks and T62 main battle tanks…." December Record at 385. Professor Williams testified that the terrorist arm of Al Qaeda, Al Qaeda *al soulba*, carried out only one terrorist attack inside of Afghanistan, which was the September 9, 2001, assassination of Northern Alliance Commander General Massoud. December Record at 401. Professor Williams also testified that Kandahar was defended by remnants of the Taliban army and the Ansar brigade. December Record at 408-09. This directly refutes the Prosecution's claim that the forces defending Kandahar at the time of Mr. Hamdan's capture were terrorists. And even if the Prosecution's third theory of culpability ─ that Mr. Hamdan is guilty of providing weapons to

unlawful enemy combatants and not terrorists ─ were a crime under the Military Commissions Act, Professor Williams would testify that the Taliban army and Ansar brigades generally complied with the laws of war and did not engage in terrorism. December Record at 382, 410-411.

Professor Williams' testimony is vital if Mr. Hamdan is to be permitted to put on a defense. *United States v. McAllister*, 64 M.J. 248, 252 (C.A.A.F. 2007).

B. Professor Williams' Testimony is both Relevant and Necessary for Mr. Hamdan to Establish the Affirmative Defense of Lawful Combatancy

Mr. Hamdan can establish the affirmative defense of lawful combatancy by producing some evidence that he was either a lawful combatant himself or a supply contractor for lawful combatants. Geneva Convention Relative to the Treatment of Prisoners of War, Article 4.A(4). The Prosecution asserts that Professor Williams' testimony is not relevant because Professor Williams cannot establish all of the elements of the affirmative defense of lawful combatancy. Prosecution Response at 2. The Prosecution cites no authority for the proposition that an expert witness is not relevant if he is unable to establish every element of an affirmative defense. Professor Williams' testimony is necessary if the Defense is to put on some evidence that the Taliban and Ansar units were the regular armed forces that complied with the law of war. Independent of Professor Williams, the Defense may offer evidence that Mr. Hamdan wore uniforms, that he was permitted by the Taliban government to carry arms openly, and that he was doing so on the day of his capture.

While Mr. Hamdan was not wearing a military uniform at the time of his capture, the obligation to wear a uniform applies only to combatants, and even then only when combatants are actively engaged in military operations. THE MANUAL OF THE LAW OF ARMED CONFLICT, U.K. MINISTRY OF DEFENSE 42 (2004). The Defense is unaware of the "undisputed facts" referenced in the Prosecution's Response that Mr. Hamdan "openly admits that he was taking an active part in hostilities while not wearing a uniform…." Prosecution Response at 2. And the

Prosecution provides no citation or reference to these "undisputed facts." Mr. Hamdan was completely unaware of the presence of U.S. forces in Taktepol, and there is nothing that has been discovered to the Defense that suggests that he was attempting to engage U.S. forces when he was captured.

While two of the elements of the defense of lawful combatancy involve elements that the Defense can establish through the introduction of evidence, the remaining two elements can only be established through the expert testimony of Professor Williams.

C. Mr. Hamdan Must be Afforded the Same Opportunity to Consult with Experts as the Prosecution

Citing *United States v. Washington*, 46 M.J. 477 (C.A.A.F. 1997), the Prosecution argues that the Defense is not automatically entitled to expert assistance when the Prosecution has sought such assistance. Prosecution Response at 2. More accurately, *Washington* stands for the proposition that "the defense cannot establish its inability to gather evidence, even in a foreign country, simply by noting that the prosecution employed expert assistance to prepare its case." *Washington*, 46 M.J. at 480. Unlike the defense team in *Washington*, the Defense in this case is not seeking a defense investigator to gather evidence in a foreign country and relying solely on the fact that the government employed investigators to investigate the case as the basis for its request. In this case, the Defense has demonstrated why Professor Williams' testimony is relevant, what the expert assistance would accomplish for Mr. Hamdan, and why the Defense is unable to gather and present the evidence that Professor Williams would develop. *Id.* Specifically, Professor Williams will assist the Defense in its review of Mr. Evan Kohlmann's purported "documentary." And Professor Williams will assist the Defense in reviewing Mr. Kohlmann's qualifications to serve as an expert before this Commission including his academic credentials and publications that have been subject to peer review. "Where the Government has found it necessary to grant itself an expert . . . fundamental fairness compels the military judge to be vigilant to ensure that an accused is not disadvantaged by a lack of resources and denied

necessary expert assistance in the preparation or presentation of his defense." *United States v. Lee*, 64 M.J. 213, 217 (C.A.A.F. 2006).

The Prosecution asserts that assistance is not necessary because Mr. Kohlmann's film is "a straight forward recitation of information…." Prosecution Response at 2. "But no film ─ not even documentary or observational cinema or evidence verite ─ are objective representations of reality." Jessica M. Sibley, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 Colum. J. L. & Arts 107, 128 (2005); Roslyn Myers, *Documentaries & The Law: Crime Victims as Subjects of Documentaries: Explotation or Advocacy?*, 16 Fordham Intell. Prop. Media & Ent. L. J. 733 (2006) ("Nevertheless, documentaries have never been completely objective."). Mr. Kohlmann has assembled his "documentary" by selecting "topics, people, vistas, angles, lenses, juxtapositions, sounds, words." *Id.* "Each selection is an expression of his point of view, whether he is aware of it or not, whether he acknowledges it or not." *Id.*

Professor Williams' assistance is necessary to verify that Mr. Kohlmann's film is in fact the "straightforward recitation of information…." that the Prosecution claims it to be.

4. <u>Attachments</u>:

A) Tom Coghlan, *Taliban in first heat-seeking missile attack*, Telegraph, Jul. 29, 2007

Respectfully submitted,

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Attachment A

Taliban in first heat-seeking missile attack

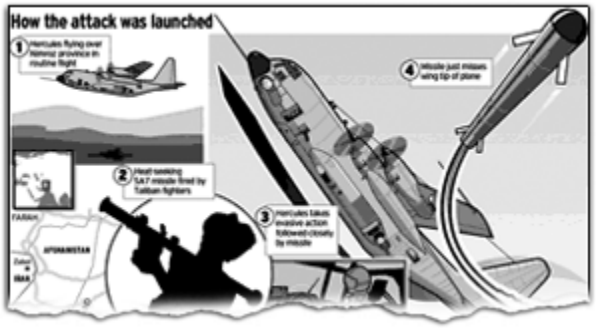
By Tom Coghlan in Kabul
Last Updated: 12:43am BST 29/07/2007

- **Frontline: Reports from Iraq and Afghanistan**

Taliban militants have used a heat-seeking surface-to-air missile to attack a Western aircraft over Afghanistan for the first time.

The attack with a weapon believed to have been smuggled across the border with Iran represents a worrying increase in the capability of the militants which Western commanders had long feared.

The Daily Telegraph has learnt that the Taliban attempted to bring down an American C-130 Hercules aircraft flying over the south-western province of Nimroz on July 22. The crew reported that a missile system locked on to their aircraft and that a missile was fired.



Click to enlarge: how the attack was launched

It closed in on the large C-130 aircraft, pursuing it as the pilots launched a series of violent evasive manoeuvres and jettisoned flares to confuse the heat sensors in the nose of the missile. Crew members said that they saw what they believe was a missile passing very close to the aircraft. The C-130 was not damaged in the attack.

Nato officials yesterday refused to confirm or deny that such an attack had taken place.

"If there was such an incident of the type you describe in Nimroz it is classified," said a Nato spokesman. "I can't release it, if in fact it did occur."

However, a surface-to-air missile alert was put out for Western aircraft travelling in the south-west of Afghanistan in the last week, which affected both civilian and military aircraft.

It was confirmed by civilian air operators in Helmand province. It remains in place. Western military commanders have been aware of concerted efforts by the Taliban to obtain shoulder-launched surface-to-air missiles, so-called Manpads (man portable air defence system).

The recent attack was probably with an SA7 shoulder-launched missile, an elderly model of Soviet or Chinese origin. Though relatively primitive they are still a potent weapon, particularly against low-flying helicopters, such as the workhorse Chinook transporters used by British forces in the southern Helmand province.

The C-130 attacked in Nimroz was flying at 11,000ft at the time of the attack, which is within the 2.5-5 km range of a shoulder-launched missile system such as the SA7.

Though the West supplied hundreds of sophisticated Stinger heat-seeking missiles to the Afghan Mujaheddin in the 1980s, they are not thought to be still usable because of the deterioration of their sophisticated electronics and battery systems.

As a contingency in 2002, the United States government offered an amnesty on Stingers and successfully bought back many of the missiles still in the arsenals of Afghan warlords for $40,000 a missile.

To date, the Taliban has shot down a number of Western helicopters, but only through the use of unguided rocket-propelled grenades, which have a range of only 500 yards.

In April members of the Special Boat Service operating in Nimroz province intercepted several truck loads of weapons coming across the Iranian border, including a working SA7 missile. It was one of a number of recent weapon caches that Western officials claim have been seized on the border with Iran, fuelling allegations by Britain and America that Iran, or elements within the Iranian government, have begun supplying arms to the Taliban.

Hundreds of SA7 missiles disappeared into the black market in Iraq in the aftermath of the fall of Saddam Hussein, where they have since been used to shoot down dozens of helicopters and aircraft, reportedly including a British C-130 in 2005.

Meanwhile, a Taliban spokesman said that the group would allow more time for an envoy from Seoul to travel to join talks for the release of 22 South Korean hostages. But the spokesman repeated the threat that militants would kill the 22 Christian missionaries.

[redacted]

From: Prasow, Andrea, Ms, DoD OGC

Sent: Wednesday, April 02, 2008 3:08 PM

To: [redacted]

Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; [redacted] DoD OGC; McMillan, Joseph M. (Perkins Coie); Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Schneider, Harry (Perkins Coie); Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC

Subject: U.S. v. Hamdan - D-025 Defense Reply to Government Response to Defense Motion for Employment of an Expert Witness (Williams)

Signed By: [redacted]

Attachments: D025 Defense Reply to Defense Motion for Expert Witness.doc; D025 Defense Reply with Attachments.pdf

[redacted],

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Respectfully submitted,
AJP

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UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**D-024** **Defense Reply** to Defense Motion to Compel Production of Out-of-Country Witnesses at Trial, Deposition Testimony, or, Alternatively, Abatement 3 April 2008

1. **Timeliness:** This reply is filed within the time frame permitted by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's orders dated 20 December 2007 and 15 February 2008.

2. **Relief Sought:** Defendant Salim Ahmed Hamdan moves for an order compelling the Prosecution to produce at trial, via live video testimony or otherwise, witnesses to testify for the Defense, an order compelling depositions of certain witnesses, or, alternatively, abatement of the proceedings.

3. **Overview:** The Defense timely requested production of four out-of-country witness to testify on Mr. Hamdan's behalf at trial. The Prosecution has unreasonably refused to produce these witnesses, or to offer the Defense and the Commission any guarantee that it will provide an adequate substitute in the form of live video testimony. The Prosecution Response fails to provide a single valid reason for denying Mr. Hamdan the right to present witnesses in his own defense. Instead, it casts aspersions on Mr. Hamdan's family and ignores the explicit acknowledgment by the Military Judge that Mr. Hamdan is entitled to have his own witnesses produced at trial.

4. **Law and Argument:**

A. THE DEFENSE IS ENTITLED TO PRODUCTION OF RELEVANT AND NECESSARY WITNESSES

The Prosecution Response fails to provide a single, legitimate basis for refusing to produce the requested witnesses. Indeed, the Prosecution Response is entirely inappropriate. It ignores the fact that counsel, under an ethical obligation to their client and this Commission,

have made good-faith assertions as to the relevance and necessity of these witnesses. Instead, the Prosecution suggests, yet again, that Defense counsel are engaged in some spurious fishing expedition. The Defense has requested production of four witnesses, three of whom were previously found relevant and necessary by the Military Judge and one of whom, even based only on the Prosecution's own statements as to his role in al Qaeda, is clearly relevant and necessary. The Prosecution's inappropriate assertions aside, Mr. Hamdan is plainly entitled to the production of these witnesses.

Mr. Hamdan is entitled to the production of witnesses whose testimony is both "relevant and necessary." R.M.C. 703(b)(1); 10 U.S.C. § 949j. The Prosecution Response fails to demonstrate that any of the witnesses are irrelevant or unnecessary. Unfortunately, it appears that the Prosecution has flatly refused to even attempt to produce the witnesses from Yemen, asserting that "the Prosecution has not firmly determined their ability to travel . . . ." Prosecution Response at 1. The Defense wonders what steps the Prosecution has actually taken to produce these witnesses, since it does not inform this Commission of any action. Instead, the Prosecution has engaged in an inappropriate, unfounded attack on the character of members of Mr. Hamdan's family. The Prosecution's groundless assertion that Mr. Hamdan's brother-in-law and wife "sympathize with al Qaeda" should be disregarded by the Commission.

The Military Judge acknowledged that foreign witnesses may be necessary and relevant to Mr. Hamdan's defense (and as noted in the Defense Motion, already determined that Mr. al-Bahri, Mr. al-Qala'a and Mrs. al-Qala'a were relevant to the jurisdictional hearing). *See* Final Trial Schedule, 20 December 2007 (noting that one reason for granting the Defense-requested delay was "to permit counsel to make a scheduled 5-19 January trip to Yemen to interview witnesses. This trip is important to accomplish early so that *witnesses needed for trial can be identified, and their presence obtained in a timely manner*." (emphasis added). The Defense has been duly diligent in preparing its case. Detailed Defense Counsel and Assistant Defense Counsel traveled to Yemen, interviewed witnesses, and returned unscathed in order to submit a

request for production of those witnesses at trial. Defense counsel prepared videotaped statements by two of the witnesses in order to prepare its own case and to be able to share information they obtained with other members of the defense team. The Defense should not now be penalized for adequately preparing its case and complying with the Military Judge's deadline for requesting production of relevant and necessary witnesses.

B. IF THE PROSECUTION CANNOT PRODUCE IN-PERSON TESTIMONY, IT MUST PROVIDE AN ADEQUATE SUBSTITUTE

Mr. Hamdan is being tried pursuant to the Military Commissions Act (MCA). A military commission created pursuant to the MCA only has jurisdiction over aliens. 10 U.S.C. § 948d ("A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or he law of war when committed by an alien unlawful enemy combatant . . . .") It is almost a certainty, therefore, that *anyone* being tried by military commission will seek to call foreign witnesses on his behalf. The Prosecution Response suggests that despite the fact that Congress created a statutory system for trying aliens – which includes the right to call witnesses at both the merits and sentencing phases – and that the Secretary of Defense promulgated regulations addressing the same issues, aliens being tried by military commission actually cannot call witnesses unless they happen to be located in the United States.[1] Even if the Prosecution had actually determined that the requested witnesses could not be produced – something it has not done to date with respect to Mr. al-Qala'a and Mrs. al-Qala'a – the Prosecution has not provided an adequate explanation for its refusal to guarantee their appearance via live video testimony.

Video interviews taken by defense counsel of prospective witnesses in no way constitute an adequate substitute for live testimony. One-sided interviews, taken by defense counsel themselves without the presence of a deposition officer or members of the Prosecution do not

[1] The witnesses whose proximity to the military commission is greatest are those detained at Guantanamo Bay. The Prosecution, however, has already made it clear that it opposes production of – and even contact with – those witnesses.

satisfy the requirements of due process. The Prosecution asserts that the Defense can seek to have the video tapes admitted via M.C.R.E. 803, while at the same time refusing to concede that they would be admissible under that rule.[2] Regardless of whether the Prosecution considers such video tapes admissible, the Defense does not suggest that such tape-recorded interviews are remotely adequate to protect Mr. Hamdan's right to a fair trial. Indeed, it is not only Mr. Hamdan who has an interest in the admission of only reliable testimony. The Members have the right to be presented with appropriate forms of evidence. The Prosecution's refusal to provide a form of testimony that would permit the Members to adequately judge the reliability and credibility of Mr. Hamdan's own witnesses will prejudice Mr. Hamdan's right to a fair trial. The Prosecution has already sought and received live testimony of witnesses at the jurisdictional hearing. It must, therefore, concede at some level that live testimony plays an important role, regardless of whether M.C.R.E. 803 theoretically might permit the introduction of a video tape taken solely for case-preparation reasons.

C. DEPOSITIONS SHOULD BE ORDERED IN ORDER TO SECURE MR. HAMDAN'S RIGHT TO HAVE WITNESSES TESTIFY IN HIS DEFENSE

The Prosecution has not offered any valid reason why deposition testimony should not be taken in order to preserve Mr. Hamdan's right to have witnesses testify on his behalf. The Prosecution Response claims that depositions are only appropriate where the witnesses are within the subpoena power of the United States. Although the Prosecution cites R.M.C. 702 for this proposition, neither the text nor the Discussion to R.M.C. 702 discuss "the power and protection of U.S. laws," Prosecution Response at 4, or make any other reference for even a preference of holding depositions only within the United States or areas under its subpoena power. Nor, contrary to the Prosecution's assertions, is a deposition conducted in Yemen the same thing as a video tape taken by defense counsel to prepare their case. A deposition ordered

[2] If the Military Judge were to rule that the witnesses need not be produced because of the video tapes – which would be an erroneous ruling, for the reasons stated above – the Military Judge should bar the Prosecution from raising any objection to the admissibility of the video tapes or any statement therein.

pursuant to R.M.C. 702 includes the presence of a deposition officer, the opportunity for both parties to examine the witness, and presumably a location somewhat more formal than the witnesses' living room, which is where counsel chose to meet with the potential witnesses. Finally, the "security concerns" raised by the Prosecution are either entirely made up (the false assertion that Mr. al-Qala'a and Mrs. al-Qala'a are al Qaeda sympathizers) or overblown.

D. THERE ARE NO "SECURITY CONCERNS" THAT JUSTIFY DENYING MR. HAMDAN THE RIGHT TO CALL WITNESSES

The Prosecution has raised four separate "security concerns" that it suggests require this Commission to deny Mr. Hamdan the right to take deposition testimony or have live video testimony available at his trial. First, as already discussed, the Prosecution makes an unfounded claim that Mr. Hamdan's wife and her brother are al Qaeda sympathizers. The Prosecution offers no evidence for these assertions. This claim is not only false, it is irrelevant. Second, the Prosecution claims that al Qaeda has an active presence in Yemen. Prosecution Response at 6-7. While the Defense does not seek to minimize any potential threat to Americans traveling abroad, the Prosecution's claims are inaccurate at best. As previously noted, defense counsel traveled to Sana'a, the capital city of Yemen, where the three Yemeni witnesses are located. While present in Yemen for nearly two weeks, defense counsel received appropriate security briefings from the U.S. Embassy and traveled freely throughout the Sana'a. Similar if not identical security warnings to those cited by the Prosecution were present on the State Department website at the time defense counsel requested, and were approved, official orders to travel to Sana'a. If the Prosecution had consulted a map, it would have discovered that the areas it refers to "north and east of Sanaa" are indeed, north and east of Sana'a, outside of the security checkpoints that surround the city.[3] As Mr. al-Bahri, Mr. al-Qala'a and Mrs. al-Qala'a all live in the center of Sana'a, there would be no need for anyone to pass through the checkpoints and enter a

[3] *See, e.g.*, Website of the Foreign & Commonwealth Office, United Kingdom, http://www.fco.gov.uk/en/travelling-and-living-overseas/travel-advice-by-country/middle-east-north-africa/yemen?ta=safetySecurity&pg=2 (last visited 3 Apr. 2008) ("If you wish to travel outside Sana'a you may need prior permission from the Yemen Tourist Police.").

potentially dangerous area. Travel to these areas was prohibited at the time of the defense trip in January 2008. The Prosecution Response does not mention a single practical barrier to taking depositions in Sana'a, or to providing the necessary personnel to facilitate live video testimony. Finally, the Prosecution's reference to the killing of Daniel Pearl and amorphous, alleged threats to "the United States and its allies" does not warrant a response. The United States has chosen to prosecute Mr. Hamdan. If it feels that affording him a fair trial is too dangerous an endeavor, it can dismiss the charges.

E. THE REQUESTED WITNESSES ARE RELEVANT, NECESSARY AND MUST BE PRODUCED

Nasser al-Bahri

The Prosecution has correctly identified that Mr. al-Bahri served as a member of Osama bin Laden's bodyguard detail. Indeed, that is the very reason the Defense seeks to call him as a witness. The videotaped interview of Mr. al-Bahri was taken by the Defense in 2004 when Mr. Hamdan was facing charges under an illegal military commission system. Since the enactment of the MCA and the referral of new charges, the Defense has not taken any sworn statements from Mr. al-Bahri. The Defense has, however, received additional discovery, conducted investigations and developed a theory of its case – all of which have led the Defense to believe Mr. al-Bahri's testimony is both relevant and necessary. Further, as the Prosecution is well-aware, the videotaped interview did not provide the Prosecution with an opportunity to cross-examine Mr. al-Bahri. The quality of the tape is poor and would not allow the members to appropriately judge Mr. al-Bahri's credibility. Again, the Defense should not be penalized for being duly diligent in its case preparation. A videotaped statement, taken nearly four years ago, is simply not an adequate substitute for live video testimony or at the very least, a deposition to preserve his testimony should the Prosecution ultimately fail to make him available via live video testimony. The Defense seeks, therefore, an order that the Prosecution make Mr. al-Bahri available by live video testimony, and an order for his deposition in order to preserve Mr.

Hamdan's right to have witnesses appear on his behalf should live video testimony ultimately be unavailable.

Muhammed Ali Qassim al-Qala'a

The video statement obtained by the Defense for pretrial case preparation purposes is not an adequate substitute for live, in-person testimony, live video testimony, or even a deposition. For the reasons discussed above, the Members should have the opportunity to adequately assess a witness' reliability and credibility. The Prosecution Response raises no valid argument militating against his production.

Umat al-Subur Ali Qassim al-Qala'a

The video statement obtained by the Defense for pretrial case preparation purposes is not an adequate substitute for live, in-person testimony, live video testimony, or even a deposition. For the reasons discussed above, the Members should have the opportunity to adequately assess a witness' reliability and credibility. The Prosecution Response raises no valid argument militating against her production.

Abdallah Tabarak

The Prosecution continues to object to the production of Mr. Tabarak because the Defense did not provide an address and phone number for him (while noting that, as with Mr. al-Bahri, Mr. Tabarak served as a member of bin Laden's bodyguard detail and, therefore, has relevant information with respect to the charges against Mr. Hamdan). As explained in the Defense Motion, R.M.C. 703(c)(2)(B)(i) provides that the Defense should provide the "name, *telephone number, **if known,*** and address *or location of the witness such that the witness can be found upon the exercise of due diligence*." (emphases added). Further, the Prosecution's assertion that the Defense belief that the United States government could easily locate Mr. Tabarak, a former Guantanamo detainee, "is unsupportable in the law," Prosecution Response at 3, is certainly supportable in fact. The United States has a history of requiring released detainees to sign agreements indicating that they will not return to terrorist activities. *See,* e.g., Release

Agreement, Attachment A. The agreement indicates that should the detainee return to terrorist activities, he will again be detained. The language clearly suggests that the United States has a way to monitor released detainees' activities and to re-detain them should it so desire. The Defense, therefore, finds it hard to believe that the United States does not know where Mr. Tabarak is, or that it could not locate him. Indeed, the Prosecution Response makes no such claim. If the Prosecution has some legitimate reason for denying access to Mr. Tabarak – a policy that the United States appears to have been following since 2003[4] – it should say so in order to allow the Military Judge to determine if it is legitimate. Accordingly, the Defense request for production of Mr. Tabarak via live video testimony, and the Defense request for his deposition, should be granted.[5]

F. IF THE WITNESSES ARE NOT PRODUCED, ABATEMENT IS THE APPROPRIATE REMEDY

Other than expressing its desire that the proceedings go forward without any of Mr. Hamdan's requested witnesses, the Prosecution Response provides no valid reason why abatement is not the appropriate remedy for denial of the witnesses. The Defense notes that the Convening Authority has either denied or failed to approve every one of the expert consultants and witnesses sought by the Defense. The government theory appears to be that Mr. Hamdan can and should be prosecuted without the assistance of a single fact or expert witness. Thankfully, Congress and the Secretary of Defense provided otherwise in the MCA and the Regulation for Trial by Military Commission.

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[4] *See* Craig Whitlock, *Al Qaeda Detainee's Mysterious Release*, WASH. POST, Jan. 30, 2006, at A01 ("Although the Red Cross was supposed to have access to all persons in military custody, Maj. Gen. Geoffrey Miller told Red Cross inspectors on Oct. 9, 2003, that they could not visit Tabarak or three other detainees 'because of military necessity,' according to the memos. On a follow-up visit Feb. 2, 2004, Miller informed Red Cross officials that they could see anyone at the base, except Tabarak. Miller once again cited 'military necessity.'") (Attachment B).

[5] The standards for production of witnesses and an order permitting the taking of a deposition are different. While the Defense believes its request for Mr. Tabarak's production at trial and its Motion adequately address both standards, at a minimum the Defense has met the lower standard for deposition testimony. As with the "high value" detainees, if the Defense is provided with the opportunity to interview the witness, it can provide a more detailed synopsis of expected testimony.

5. **Attachments:**

A. Release Agreement

B. Craig Whitlock, *Al Qaeda Detainee's Mysterious Release*, WASH. POST, Jan. 30, 2006

Respectfully submitted,

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Attachment A

[redacted]

AGREEMENT

WHEREAS, as a result of certain terrorist attacks, the United States and its coalition partners are engaged in armed conflict with al Qaida, an international terrorist organization, and its Taliban supporters; and

WHEREAS, _____ was detained as an enemy combatant during such armed conflict;

_____ undertakes as conditions for no longer being detained the following:

- THAT he will not in any way affiliate himself with al Qaida or its Taliban supporters;
- THAT he will not engage in, assist, or conspire to commit any combatant activities, or act in preparation thereof against the United States or its citizens, or against allies of the United States or citizens of such allies;
- THAT he will not engage in, assist, or conspire to commit any acts of terrorism or knowingly harbor anyone who does;

FURTHERMORE, _____ agrees that if he does not fulfill any of the above stated conditions, he may be detained immediately consistent with the law of armed conflict;

IN CONSIDERATION of these conditions, it is agreed that _____ will not be further detained by the United States, but should he not fulfill any of these conditions he may again be detained consistent with the law of armed conflict.

The agreement has been read to me and I understand the contents.

Signed this ___ day of _____, 200__

_____ _____

Signature of Detainee to be released Appropriate U.S. Official

_____ _____

Witness ISN# and Printed Detainee Name

Attachment B

1 of 1 DOCUMENT

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HEADLINE: Al Qaeda Detainee's Mysterious Release;
Moroccan Spoke Of Aiding Bin Laden During 2001 Escape

BYLINE: Craig Whitlock, Washington Post Foreign Service

DATELINE: RABAT, Morocco

BODY:

For more than a decade, Osama bin Laden had few soldiers more devoted than Abdallah Tabarak. A former Moroccan transit worker, Tabarak served as a bodyguard for the al Qaeda leader, worked on his farm in Sudan and helped run a gemstone smuggling racket in Afghanistan, court records here show.

During the battle of Tora Bora in December 2001, when al Qaeda leaders were pinned down by U.S. forces, Tabarak sacrificed himself to engineer their escape. He headed toward the Pakistani border while making calls on Osama bin Laden's satellite phone as bin Laden and the others fled in the other direction.

Tabarak was captured and taken to the U.S. Navy base at Guantanamo Bay, Cuba, where he was classified as such a high-value prisoner that the Pentagon repeatedly denied requests by the International Committee of the Red Cross to see him. Then, after spending almost three years at the base, he was suddenly released.

Today, the al Qaeda loyalist known locally as the "emir" of Guantanamo walks the streets of his old neighborhood near Casablanca, more or less a free man. In a decision that neither the Pentagon nor Moroccan officials will explain publicly, Tabarak was transferred to Morocco in August 2004 and released from police custody four months later.

Tabarak's odyssey from Afghanistan to Guantanamo and back to his native land illustrates the grit and at times fanatical determination of one bin Laden recruit. Yet his story also shows how little is known publicly about al Qaeda figures who were captured after the Sept. 11, 2001, attacks on New York and the Pentagon. Major gaps remain in his account, and terrorism experts and intelligence officials continue to debate whether he was a member of al Qaeda's inner circle or its rank and file.

His case also highlights mysteries of U.S. priorities in deciding who to keep and who to let go. As the Pentagon gears up to hold its first military tribunals at Guantanamo after four years of preparations, it has released a prisoner it called a key operative. At the same time, it retains under heavy guard men whose background and significance are never discussed.

Eighteen months after he left Guantanamo, Tabarak, 50, still faces minor criminal offenses in Rabat, the capital, such as passport forgery and conspiracy. But his attorney predicts that it's only a matter of time before the case is dropped and all allegations of terrorist activities are dismissed.

The attorney, Abdelfattah Zahrach, said his client's importance as an al Qaeda figure has been exaggerated, although he acknowledged that Tabarak knew bin Laden and worked for one of his companies.

"He was in bin Laden's environment, but he didn't play an operational role," Zahrach said. "Do you think that if he was really the bodyguard of bin Laden that the Americans would have let him come back to Morocco?"

A review of Moroccan court documents, including records of his interrogations by Moroccan investigators, shows the U.S. military had good reason to consider Tabarak a valuable catch. In addition to his firsthand knowledge of how bin Laden survived Tora Bora, he had worked for the al Qaeda leader since 1989 and was often at his side as he built the terrorist network from bases in Afghanistan, Pakistan and Sudan.

According to the documents, details of which other foreign intelligence officials confirmed, Tabarak served as a jack-of-all-trades for members of the inner circle. For several years, he received his orders and a regular salary from Saeed Masri, an al Qaeda financier, military training camp leader and relative of bin Laden.

Tabarak also dedicated his family to the cause. One daughter, Asia, married a top al Qaeda operations commander, Abu Feraj Libi, who was captured in Pakistan in May 2005 and is blamed for assassination plots against Pakistan's president, Gen. Pervez Musharraf.

A son, Omar, fought alongside the Taliban in Afghanistan in late 2001 and was captured by Afghan allies of the Americans. When he was released in a prisoner swap, bin Laden threw a feast to celebrate, according to Tabarak's statements to interrogators.

Defense Department officials declined to say why Tabarak was released from Guantanamo, in August 2004, when he and four other Moroccan detainees were handed over to authorities in Rabat. "The decision to transfer or release a detainee is based on many factors, including whether the detainee is of further intelligence value to the United States and whether the detainee is believed to pose a continuing threat to the United States if released," said Navy Lt. Cmdr. J.D. Gordon, a Pentagon spokesman.

According to interviews in Rabat with people who are familiar with Tabarak's case, however, Moroccan officials had pressed the U.S. military for many months to hand over Tabarak, arguing that they would have a better chance of persuading him to reveal secrets about al Qaeda.

Moroccan interrogators visited Tabarak and other Moroccan detainees at Guantanamo on two occasions and urged them to cooperate, according to his attorney and two fellow prisoners. "They came to see us and brought us coffee and sandwiches," said Mohammed Mazouz, one of the Moroccans who was later released with Tabarak. "But the Americans, they would just abuse us."

During a courtroom appearance in Rabat last year, Tabarak looked gaunt and wore a black baseball cap low on his forehead. After consenting to an interview through his attorney, he changed his mind at the last minute; guards in the courthouse audibly warned him not to speak with an American reporter.

In interviews with Arab journalists, Tabarak has given conflicting accounts, sometimes denying membership in al Qaeda or ties to bin Laden. But interrogation records show that he has described in detail to authorities a long and intimate connection with the network.

He left Morocco in 1989, he has said, on the advice of a mentor from a Casablanca mosque who urged him to become involved with Islamic fighters who were battling the communist-backed Afghan government.

After first making a pilgrimage to Saudi Arabia, Tabarak recounted, he traveled to Pakistan, a staging area for guerrillas fighting in Afghanistan, and joined bin Laden's network. He received military training at two camps near Khost, Afghanistan, and met with bin Laden at a guest house in the Pakistani city of Peshawar.

Tabarak told his interrogators that he received the equivalent of $250 a month to help funnel foreign fighters into Afghanistan. When Pakistani authorities decided to crack down on outsiders in their country, he followed bin Laden to Sudan. There he worked on a farm raising cattle, served as a bodyguard and performed other tasks.

By the time bin Laden returned to Afghanistan in 1996, Tabarak was taking on more important roles. He said he worked for a while in a "precious stones" smuggling operation that raised money for al Qaeda. Eventually, he joined bin Laden's personal security detail, accompanying the Saudi on trips across the country to meet with other figures from al Qaeda and the Taliban movement.

Tabarak said he had no warning of the Sept. 11, 2001, attacks but helped protect bin Laden after U.S. forces went to war in Afghanistan the following month. He said he spent 20 days hiding with bin Laden and other al Qaeda leaders in Tora Bora, in rugged mountainous terrain near the Pakistani border, as U.S. forces and their Afghan militia proxies closed in.

According to Moroccan and other foreign intelligence officials, Tabarak sacrificed himself so the others could escape. He took bin Laden's satellite phone, which the al Qaeda leader apparently assumed was being tracked by U.S. spy technology, and walked toward the Pakistani border as the al Qaeda leadership fled in the opposite direction. The ruse worked, although Tabarak and others were captured.

"I escaped as part of a group that included mostly Saudis and Yemenis towards Pakistan, until we were arrested by Pakistani authorities at a border crossing point and then afterwards handed over to American authorities," he told Moroccan interrogators in August 2004.

Zahrach, Tabarak's attorney, confirmed that his client was caught near the border and handed over to the U.S. military. But he denied Tabarak helped bin Laden escape from Tora Bora. He dismissed the interrogation reports as forgeries. He said Moroccan officials have no evidence for their allegations but are too embarrassed to admit it.

"They have to charge him with something in Morocco to prevent him from talking," Zahrach said. "They have to keep him tied up in court and keep him under pressure." Tabarak's next scheduled court appearance is Friday in Rabat. Officials with the Moroccan Communications Ministry declined to comment on the case.

Mohammed Darif, a Moroccan terrorism analyst and political science professor, said Moroccan intelligence officials have overstated Tabarak's role in al Qaeda. He said bin Laden relied almost exclusively on fellow Saudis and tribal relatives from Yemen to provide for his personal safety and was unlikely to accept an uneducated, poor Moroccan into his inner circle.

"People who have known him all along say that Tabarak was a serious player but that perhaps his reputation is a little overblown," said Darif, who interviewed Tabarak after his release from Guantanamo. "He may have been a loyal worker, but he's not sophisticated. When you talk to him, you see pretty clearly that the guy does not have a strong personality."

But other intelligence sources in Europe and the Middle East suggest that his behavior at Guantanamo is further confirmation of his importance. There, they say, he developed a reputation as a tough-minded leader among the detainees. Moroccan officials have described him as an "emir" of the camp who resisted his American interrogators and catalyzed hunger strikes among prisoners.

Defense Department memos obtained by The Washington Post in 2004 show that Guantanamo officials repeatedly prevented inspectors from the International Committee of the Red Cross from seeing Tabarak.

Although the Red Cross was supposed to have access to all persons in military custody, Maj. Gen. Geoffrey Miller told Red Cross inspectors on Oct. 9, 2003, that they could not visit Tabarak or three other detainees "because of military necessity," according to the memos. On a follow-up visit Feb. 2, 2004, Miller informed Red Cross officials that they could see anyone at the base, except Tabarak. Miller once again cited "military necessity." A Defense Department spokesman declined to comment on the memos.

Tabarak has told his attorney and other detainees that he was kept in an isolation cell during most of his stay at Guantanamo. For about one year, he said, he was interrogated only while blindfolded, so he could not see his captors or even know for certain if he was in Cuba or another country.

Staff writer Scott Higham and researcher Julie Tate in Washington contributed to this report.

LOAD-DATE: January 30, 2006

Edmonds, Matthew, SSG, DoD OGC

From: Prasow, Andrea, Ms, DoD OGC

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Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; [redacted], DoD OGC; McMillan, Joseph M. (Perkins Coie); Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Schneider, Harry (Perkins Coie); Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC

Subject: U.S. v. Hamdan - D-024 Defense Reply to Defense Motion to Compel Production of Out-of-Country Witnesses at Trial

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Attachments: D024 Defense Reply to Defense Motion to Compel Production of Out-of-Country Witnesses at Trial.DOC; D024 Defense Reply with Attachments.pdf

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Attached for filing in the case of *United States v. Hamdan* please find D-024 Defense Reply to Defense Motion to Compel Production of Out-of-Country Witnesses at Trial, Deposition Testimony, or, Alternatively, Abatement. The PDF version is signed and includes attachments; the Word version is unsigned and does not include attachments.

Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
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